

2001

# Anthony Huemiller v. Ogden Police Department, Ogden Civil Service Commision : Brief of Petitioner

Utah Court of Appeals

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Erik Strindberg; Lauren I. Scholnick; Ralph E. Chamness; April Hollingsworth; Stindeberg and Sholnick; Attorney for Petitioner .

Douglas Holmes; Attorney for Ogden Civil Service Commission. Stanely J. Preston; Judith D. Wolferts; Snow, Christensen and Martineau; Attorneys for Ogden Police Department.

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## Recommended Citation

Legal Brief, *Huemiller v. Ogden Police Department, Ogden Civil Service Commision*, No. 20010968 (Utah Court of Appeals, 2001).  
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**FILED**  
Utah Court of Appeals  
**DEC 22 2003**  
Paulette Stagg  
Clerk of the Court  
*Lodge*

IN THE UTAH COURT OF APPEALS

ANTHONY HUEMILLER,

Grievant,

vs.

OGDEN POLICE DEPARTMENT,

Department.

ANTHONY HUEMILLER,

Petitioner,

vs.

OGDEN CIVIL SERVICE  
COMMISSION,

Respondent.

**BRIEF OF PETITIONER**

Appeal No. 20010968CA

Petition for Review of Decision of the Ogden Civil Service Commission

Stan Preston  
Judith Wolferts  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, #1100  
Salt Lake City, Utah 84111  
Attorneys for Ogden Police Department

Doug Holmes  
274-1/2 25<sup>th</sup> Street  
Ogden, Utah 84401  
Attorney for Ogden  
Civil Service Commission

Erik Strindberg (Bar No. 4154)  
Lauren I. Scholnick (Bar No. 7776)  
Ralph E. Chamness (Bar No. 6511)  
April L. Hollingsworth (Bar No. 9391)  
STRINDBERG & SCHOLNICK  
44 Exchange Place, 2<sup>nd</sup> Floor  
Salt Lake City, Utah  
Attorney for Petitioner

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274-1/2 25<sup>th</sup> Street  
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April L. Hollingsworth (Bar No. 9391)  
STRINDBERG & SCHOLNICK  
44 Exchange Place, 2<sup>nd</sup> Floor  
Salt Lake City, Utah  
Attorney for Petitioner

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## **JURISDICTION**

This is a petition for review of the decision of a municipal civil service commission. The Ogden Civil Service Commission (“OCSC”) issued its Findings of Fact, Conclusions of Law, and Order regarding the Grievance and Appeal of Sergeant Anthony Huemiller (“Huemiller”) on November 20, 2001 (the “Decision”). Petitioner Huemiller filed his Writ of Review on December 10, 2001, pursuant to Rule 14 of the Utah Rules of Appellate Procedure. Jurisdiction is conferred on this Court pursuant to Utah Code Annotated, § 10-3-1012.5 (2002). That statute states, “Any final action or order of the commission may be appealed to the Court of Appeals for review.” Id.



## ISSUES PRESENTED

1. Is there substantial evidence supporting the decision of the OCSC?

The standard used in this inquiry is whether the facts meet the “substantial evidence” standard. “Substantial evidence is that quantum and quality of evidence that is adequate to convince a reasonable mind to support a conclusion.” Lucas v. Murray City Civil Service Commission, 949 P.2d 746, 758 (Utah Ct. App. 1997).

2. Do the charges warrant the sanction of termination?

This standard of review is an abuse of discretion standard. Id. at 761. A Chief exceeds his or her scope of discretion if the punishment is in excess of “the range of sanctions permitted by statute or regulation, or if, in light of all the circumstances, the punishment is disproportionate to the offense.” Id.

3. Does the OCSC’s Rule 10-6, which requires a grievant to disprove the accusations against him, violate Huemiller’s rights to due process and/or state statute?

Due process challenges are “questions of general law” and this Court gives “no deference to [an] agency’s determination of what constitutes due process as reflected by the actual hearing.” Tolman v. Salt Lake County Attorney, 818 P.2d 23, 28 (Utah Ct. App. 1991) (citing Utah Dept. of Admin. Servs. v. Public Serv. Comm’n, 658 P.2d 601, 608 (Utah 1983)). This has also been referred to as “a correction of error standard.” King v. Industrial Commission, 850 P.2d 1281, 1285 (Ut. App. 1993).

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## STATEMENT OF THE CASE

### A. Nature of the case.

This is a petition of review of an OCSC Decision rendered November 20, 2001. The appellant, Huemiller was a police officer in the Ogden City Police Department ("OPD"). He was terminated for allegedly violating OPD's policy regarding the towing of vehicles involved in traffic accidents or stops in exchange for favors from one particular towing company, Ogden Auto Body ("OAB"). OCSC upheld that termination after a three-day hearing.

### B. Course of proceedings and disposition in the commission below.

On or about April 21, 2000, OPD informed Huemiller that he had engaged in "apparent misrepresentations of the truth, insubordination by continuing a practice clearly against the desires of top police administration, conflict of interest, violation of Ogden City Police Department policies, and conduct unbecoming an Ogden City Police Officer." (R. 1557.) He received a memorandum which outlined the charges but was provided no supporting evidence. (R. 337-40.) OPD Chief John Greiner ("Chief Greiner") met with Huemiller on May 11, 2000. Chief Greiner issued Huemiller a termination letter dated May 15, 2000, which stated that the alleged wrongdoings were sustained. (R. 1558.)

On May 19, 2000, Huemiller filed a Grievance and Appeal with the OCSC denying all the charges. Id. The OCSC held a hearing on Huemiller's Grievance and Appeal on August 13-15, 2001. The Commission affirmed Huemiller's termination and

upheld most of the allegations in the termination letter. Huemiller filed his Petition for Review with this Court on November 20, 2001.

## STATEMENT OF THE FACTS

### *Huemiller's Career At OPD*

1. From the time he was a small child, Huemiller wanted to be a police officer. He fulfilled his dream in 1983 when he began his career as an OPD police officer, as a Patrol Officer in the Uniform Division. (R. 2938.)
2. After serving for five years in the Uniform Division, OPD assigned Huemiller to Foot Patrol for one year. OPD promoted Huemiller to detective in 1989. (R. 2939-40.)
3. In 1992, Huemiller took a three-year assignment with the Weber Morgan Narcotics Strike Force (the "Strike Force"). The Strike Force was charged with investigating narcotics trafficking and drug offenses in both Weber and Morgan counties. (R. 2941-42.)
4. After this assignment, Huemiller returned to OPD and served in the Uniform Division and in Community Policing from 1995-97. (R. 1301; 2943.)
5. OPC promoted Huemiller to Sergeant in August of 1996. (R. 1301; 2944-45.)

6. In March 1997, Huemiller transferred back to the Strike Force where he worked until January 8, 2000. He returned to OPD later in January 2000, and was reassigned to the Uniform Division (R. 1298-99; 2945; 2948.)

7. Huemiller was never assigned to OPD's Traffic Division, which meant that he was never a part of the unit which had primary responsibility for traffic accidents. (R. 2939-41; 2946; 2948-49.)

8. Over the course of his seventeen years with OPD, Huemiller received numerous commendations and awards. (R. 1303-12; 2950-53.) He was chosen OPD Employee of the Year for 1994. (R. 1310-11; 2950.)

9. OPD suspended Huemiller in March 2000, less than three months after he had returned to OPD from the Strike Force. Huemiller's suspension began when OPD started investigating the "towing" complaint (see ¶ 32, below). (R. 2948.)

#### *History of Towing Issues in Ogden*

10. OPD used private companies to tow motor vehicles for two purposes: 1) to tow vehicles disabled in accidents (these tows were quite lucrative as they often led to repair business) and 2) to tow (and impound) vehicles seized as a result of drug trafficking under drug seizure and asset-forfeiture laws. There was only one company at a time under contract to tow impounded vehicles. (R. 318; 2741-42.)

11. At no relevant time, including during the year 2000, was there an official, printed OPD policy setting forth the procedure for arranging the towing of vehicles. (R. 2864-65.)

12. In 1969, fourteen years before Huemiller joined OPD, then Chief Jacobsen issued a Supplement to General Order No. 61, explaining that a driver was to be asked which wrecker he or she preferred, and if there was no preference then the next wrecker on the “list” would be called. (R. 636.) This document was never given to or shown to Huemiller. (R. 3006-07.)

13. At some point in time, Wrecker Dispatch, which was privately owned and run, was established. Wrecker Dispatch had a list of towing companies and was supposed to assign tows by going down this list and assigning the job to the next company on the list. Wrecker Dispatch was accessed by telephone. (R. 546-553.)

14. On May 31, 1995, then Interim Police Chief Greenwood (“Greenwood”) issued a memorandum on towing. Per OPD policy, a memorandum, unlike a policy, expired once it had been complied with. The memorandum stated, “under no circumstances will an officer request a specific wrecker service.” It also instructed that: 1) when an owner requested a certain wrecker service that owner’s name would be given to the dispatcher who would then call Wrecker Dispatch; 2) wreckers that simply showed up without a call would not be allowed to tow vehicles; 3) officers could not call

wreckers by phone or any other means to avoid going through dispatch; and 4) all drug-related impounds would be done by Intermountain Auto. (R. 1289; 2865.)

15. As Greenwood clarified, drug impound tows were handled differently than tows resulting from an automobile accident. If a vehicle was implicated in narcotics trafficking (through the presence of drugs or paraphernalia) it could be impounded and eventually forfeited by state law. The Strike Force had entered into an exclusive contract with one towing company for impound tows so the officer in charge of inventory could keep better track of those impounds. (R. 2741-42.)

16. Intermountain Auto held the exclusive contract with the Strike Force in 1995. In approximately 1998, OAB became the exclusive impound towing company. (R. 2741.)

17. Although every law enforcement officer in Weber County was instructed to have OAB tow all vehicles involved in drug seizures, they were not instructed on how to contact OAB (that is, directly or indirectly through Wrecker Dispatch). (R. 2743, 2747-48.)

18. Strike Force officers, however, were instructed to telephone OAB directly, instead of going through dispatch, to have OAB tow an impounded vehicle. This is how Huemiller was taught to handle drug seizures both times he was with the Strike Force. (R. 2743.)

19. There was a long history of the towing companies engaging in inter-company warfare. In 1992 and 1993, one of the members of the Towing Association in Ogden began complaining to the OPD Chief Mike Empey (“Chief Empey”) that the Baur brothers, who owned separate towing companies (Clair Baur owns OAB and Gary Baur owns Brett’s Towing), were getting too many tows. (R. 2849-50.)

20. Although Chief Empey noted the complaint and began a file, he apparently did nothing about the complaint. (R. 2850.)

21. In 1994 or 1995, another towing company made a complaint to Marlin Balls (“Balls”) who was a supervisor in the detective division. Balls did an investigation, although no report was issued. (R. 2850-51.)

22. In 1996, the attorney for the Towing Association made a complaint to Chief Greiner. (R. 2852.)

23. He alleged that Traffic division officers were sending tows directly to Brett’s Towing, in violation of the agreement between the Association and OPD which required all tows for vehicles in accidents be ordered through “Wrecker Dispatch”. (R. 637; 2852.)

24. In January 1996, Chief Greiner gave Greenwood the task of conducting an investigation into the complaint. (R. 1362; 2853.)

25. Greenwood interviewed police officers, including Huemiller, as part of the investigation. (R. 1374-1376; 3111.)



26. Greenwood did not record the interviews he conducted as part of his investigation. Instead, he merely took notes. (R. 3112; 3125-26.)

27. According to Greenwood's notes, he asked Huemiller whether Huemiller had circumvented the wrecker dispatch system in the last year. (Greenwood's questions were also not recorded.) Huemiller answered that he had on only two occasions (See ¶ 50 below for details) (R. 1374.)

28. Huemiller told Greenwood that on those two occasions he had called OAB directly at the request of the accident victims. (R. 1374.)

29. Greenwood's investigation concluded that, "I have been unable to uncover any obvious, widespread plot on the part of Ogden City police officers to circumvent the wrecker dispatch service. All officers answered questions to the best of their memory and recollection." (R. 1379; 2856.)

30. Neither Huemiller nor any other officer received any discipline as a result of the Greenwood investigation. (R. 2856.)

31. In 1999, Jeff Wangsgard, of Ron's Auto Body, complained to OPD about towing. Balls again investigated the complaint (no report was ever done) and no one was disciplined. (R. 2861-63.)

32. In 2000, Wangsgard again approached OPD and complained that three officers, Huemiller, Ron VanBeekum, and Kelly Zaugg, were violating some policy involving towing (the "Wangsgard complaint"). (R. 2863-64.)

33. At the time of the Wangsgard complaint, Huemiller had been back at OPD for only about two months. (R. 2946.)

*Huemiller's Termination*

34. Chief Greiner asked Lieutenant Randy Watt ("Watt"), who later brought in Lieutenant John Stubbs ("Stubbs"), to investigate the Wangsgard complaint. (R. 2784.)

35. Stubbs looked at wrecker dispatch logs, cell phone logs, accident reports, spread sheets (prepared by Watt) and interviewed police officers in the course of the investigation. (R. 2788.)

36. At the end of the investigation, Chief Greiner told Huemiller that he might be terminated from his position and provided him with a short memorandum written by Watt to Balls. (R. 337-40.)

37. This memorandum set forth conclusory findings without providing any evidence to support the conclusions. The memorandum referred to detailed information in an investigative notebook, which was never provided to Huemiller. (R. 337-40.)

38. In fact, despite repeated requests by Huemiller and his attorneys for the "investigative notebook," OPD did not provide it to Huemiller until the last day of the three-day hearing before OCSC. (R. 8; 9; 12-15; 29-30.)

39. At the predetermination meeting held on May 11, 2000, Chief Greiner read aloud from the "investigative notebook." Huemiller requested that he be given a Garrity warning so that he could respond to the accusations without fear that anything he said

could be used against him in a criminal investigation. OPD refused to give him this warning, so he was only able to respond in generalities to the charges. OPD terminated Huemiller on May 15, 2000. (R. 347; 622.)

*Challenge to OCSC's Rule 10-6*

40. The OCSC hears appeals pursuant to Utah Code Annotated § 10-3-1012(1):

All persons in the classified civil service may be . . . removed from office or employment by the head of the department for misconduct, incompetency, failure to perform duties, or failure to observe properly the rules of the department, but subject to appeal by the suspended or discharged person to the civil service commission.

41. OCSC, Rules and Regulations, Rule 10-6 states, in relevant part:

The procedure at the hearing shall require that the appellant first establish the grounds on which he or she relies to disprove the action taken by the appointing authority which he or she considers creates the adverse affects. [sic] Following the appellant's case, the City may enter its rebuttal evidence.

42. Huemiller filed a Motion to Require Department to Prove the Charges

Against Him, seeking to place the burden of proof back on OPD. (R. 50-59.)

43. OCSC denied Huemiller's Motion after hearing oral argument.

44. At the hearing, prior to putting on any evidence, Huemiller's counsel again objected to OCSC's decision to require that Huemiller disprove the allegations against him and indicated that Huemiller was not waiving his rights to appeal this issue by going forward with the hearing. (R. 2549-50.)

### *OCSC's Decision*

45. OCSC held a three-day hearing on August 13-15, 2001. OCSC entered its Decision three months later, on November 20, 2001, affirming OPD's termination of Huemiller. (R. 1563.)

46. The Decision makes no reference to testimony, but rather relies solely on the investigative report. (R. 1557-1563)

47. The Decision is not a model of clarity and does not set forth what "facts" support which "conclusions." It also makes no reference to the initial charges against Huemiller, and does not indicate which charges were sustained and which charges were found not to be supported. The Decision also makes no reference to the appropriateness of the penalty. (R. 1557-1562.)

48. The Decision upholds the termination of Huemiller's employment for what appears to be four reasons: (1) Huemiller misrepresented the truth about whether he had circumvented wrecker dispatch procedure; (2) Huemiller violated a long term policy regarding towing procedures; (3) Huemiller had a conflict of interest; and (4) Huemiller had engaged in conduct unbecoming an officer.

### *Evidence at the Hearing Pertaining to Each OCSC Conclusion*

Huemiller misrepresented the truth about whether he had circumvented wrecker dispatch procedure.

49. Stubbs testified that he believed Huemiller lied to Greenwood because, "One said that he had not circumvented Wrecker Dispatch, that would be to A.K.

Greenwood, he told me that yes he did, in fact, prior to 1995, which takes us right up to the A.K. Greenwood investigation, he had indeed been violating that policy.” (R. 2834-35.)

50. The evidence presented concerning the first interview, the Greenwood interview, was as follows:

- a. Greenwood did not make a verbatim transcript of the 1996 interview he did with Huemiller.
- b. According to his report notes, Greenwood supposedly asked Huemiller if he had circumvented the wrecker dispatch in the last year. (R. 1374.)
- c. Huemiller admitted that when drivers specifically requested OAB, he called OAB directly on his own personal phone to expedite the tow. (R. 1374.)
- d. Huemiller told Greenwood that he had called OAB directly on two occasions in the last year, when “accident victims” requested OAB to expedite the arrival of the wrecker. (R. 1374.)
- e. When Greenwood asked Huemiller about those two accidents, Huemiller said the drivers specifically asked for OAB to do the tows in each accident. (R. 1378.)

- f. Greenwood's summary of his interview with Huemiller states, "Huemiller claims he has never ever called Ogden Auto Body or any other wrecker unless a citizen requests them." (R. 1374.)
- g. Greenwood testified at the hearing that the only other substantive question he asked was if Huemiller "had any other information about these allegations." (R. 3117.)
- h. However, Greenwood never asked Huemiller whether he ever suggested or recommended a specific towing company to a driver. Greenwood also never asked Huemiller about the handling of tows older than one year. Greenwood said he thought that these were covered by his question about "other information." (R. 1363-80.)
- i. Greenwood's 1995 Memorandum regarding towing does not mention, let alone prohibit, officers from making suggestions regarding towing companies. (R. 318.)

51. The evidence presented concerning the second interview, the Stubbs interview, was as follows:

- a. On March 8, 2000, Stubbs interviewed Huemiller as part of his investigation into the Wangsgard complaint. (R. 1499-1520.)

- b. Stubbs asked Huemiller, “[H]ave you been doing this? . . . Sending unauthorized tows down to Ogden Auto Body without going through wrecker dispatch?” (R. 1499.)
- c. Huemiller said, “No.” (R. 1499.)
- d. Later, Stubbs asked Huemiller,  
  
“But you have not called Ogden Auto Body, ever, using a cell phone to bring a tow truck to an accident scene or DUI scene.” (R. 1501.)  
Huemiller: “Ever?”  
Stubbs: “Or an inbound”  
Huemiller: “That phone” [they had been talking about cellphones]  
Stubbs: “Any Phone”  
Huemiller: “Yes. I’ve called them before. I’ve had to call them.”
- e. Stubbs then asked Huemiller to exclude Strike Force calls and  
  
Huemiller explained that after he was told that he was not to circumvent wrecker dispatch, for any reason, about five years prior (he was referring to the May 1995 Greenwood memorandum), he did not recall ever calling OAB on a phone without going through wrecker dispatch. (R. 1502.)
- f. Stubbs then asked Huemiller if before he was told not to “circumvent wrecker dispatch,” he had ever called OAB directly for tows without going through wrecker dispatch. Huemiller admitted that he had. (R. 1503.)

- g. Huemiller told Stubbs that before 1995 he never called OAB unless a driver requested them. Huemiller further explained that he, as well as many other officers, would, on request, provide recommendations to drivers as to what towing company they should request if they didn't know one. (R. 1519-20.)
- h. Twice during his interview with Stubbs, Huemiller attempted to explain to Stubbs that his answers to Greenwood in 1996 were consistent with what Huemiller was saying to Stubbs in the interview. Huemiller tried to explain his answers by clarifying with Stubbs what he understood "circumventing wrecker dispatch" to mean. Stubbs remained convinced that Huemiller was changing his story, even as Huemiller tried to explain that he was not. (R. 1503-04; 1519-20.)

OCSC's conclusion that the incident at 29<sup>th</sup> and Madison showed that Huemiller lied and that he violated a long term policy of the OPD regarding towing procedures

- 52. The evidence concerning the incident at 29<sup>th</sup> and Madison was as follows:
  - a. Huemiller, while driving his patrol car, noticed a vehicle that had two tires in the gutter and two on somebody's lawn. (R. 2961.)
  - b. Huemiller, knowing that the area was notorious for drugs, went to investigate and called to inform dispatch of what he was doing. (R. 2961-62.)



- c. Two officers, B.J. Mills (“Mills”) and Mike Hunt (“Hunt”), showed up first to assist Huemiller, and approximately three other officers came later. (R. 2962.)
- d. The officers split up the three people in the vehicle to be questioned. (R. 2963-64.)
- e. Mills took the driver to administer a DUI test to see if he was impaired. (R. 2698.)
- f. Huemiller testified that, as the supervisor on the scene, he backed off and watched what was going on. (R. 2964.)
- g. Huemiller saw Mills pull a pipe used to smoke methamphetamine (or crank) out of the driver’s pocket. (R. 2964.)
- h. Huemiller had been taught that anytime there was either drug paraphernalia or drugs in a vehicle, even if it is on passenger in the vehicle, the vehicle maybe seized under state law. (R. 2965-66.)
- i. Huemiller then called OAB directly on his cell phone to pick up the vehicle because OAB had the exclusive contract to do drug seizures and that is how he had been taught to contact OAB. (R. 2946-47; 2.)
- j. John Valdez, who also had worked for the Strike Force, testified that if an officer finds drug paraphernalia on the driver of a vehicle, the vehicle could be seized. (R. 2747; 2750.)

- k. Mills testified that he did pull a crank pipe with some drug residue out of the driver's pocket, but then threw the pipe away because the driver was driving "under the influence," which was a greater offense than possession of paraphernalia. (R. 2700-01.)
- l. Huemiller did not testify that there was drug residue in the pipe, nor did he testify that he saw such residue.
- m. Mills thought that it was a proper drug seizure because the pipe had drug residue in it (although he did not think a vehicle could be seized if there was only paraphernalia found.) (R. 2703; 2705-06.)
- n. Mills said Huemiller saw him do the search of the driver. (R. 2727.)
- o. Chief Greiner testified that there was a Strike Force policy that was passed by the Executive Board of the Strike Force by the time of this stop that vehicles would not be seized if there was simply paraphernalia in the vehicle. (R. 3385-88.) The Executive Board informed the Strike Force commander of the policy change. (R. 3388.) There was no evidence presented that Huemiller knew of this "new" policy.
- p. Hunt, the assisting officer and the one that filed the paperwork on the stop, was not called to testify at the hearing, because he was on vacation. (R. 3311-12; 3388.)

- q. The paperwork showed that the driver was under the influence of marijuana but the Vehicle Impound Report does not mention that drugs or paraphernalia were found in the vehicle. (R. 1349-61.)
- r. During Stubbs' investigative interview with Huemiller, when Huemiller explained that he called OAB on this stop because he believed it was a drug seizure, Stubbs told him, "No, no, there was no evidence in the car. There were no drugs in the car. There were [sic] no paraphernalia in the car and that paperwork was plainly marked." (R. 1505.)
- s. During the investigation, Stubbs never asked Mills whether he found paraphernalia in the vehicle or on the person at this stop. (R. 2706-07.)

53. As to whether Huemiller violated towing policy and procedure by admitting that he would talk people into requesting OAB, this testimony was elicited at the hearing:

- a. Huemiller testified that before 1995, he would recommend OAB as a towing company for drivers that did not voice a preference for a towing company, because that is what he was taught by supervisors and his field training officers, and what he learned by watching other officers. He did not consider it to be a violation of policy at that time. (R. 1519-20; 3009; 3026.)

- b. Huemiller testified he became aware that he should not make recommendations as a result of the Greenwood memorandum in 1995. (R. 3037.)
- c. There was no evidence presented that Huemiller was aware that he was not supposed to recommend a certain towing company to a driver before the Greenwood memorandum.

Huemiller had a conflict of interest.

54. The evidence presented concerning whether Huemiller had a conflict of interest by accepting favors from OAB was as follows:

- a. Huemiller testified that he obtained a cellular phone on the OAB plan for his personal use when he left the Strike Force in early 2000. (R. 2988-90.)
- b. Both Huemiller and his wife, Kelli Huemiller, testified that Huemiller obtained the phone through the OAB plan because the couple was trying to buy a house and the mortgage company told him to avoid getting additional “dings” on their credit. (R. 2902; 2906-07; 2988-89.)
- c. Both Huemiller, to Stubbs during the investigation, and Kelli Huemiller, during the hearing, testified that they intended to pay the cell phone bills, but at the time the OPD investigation began, they had

not been provided a bill by OAB for Huemiller's charges. (R. 1499-1500; 2906-08.)

- d. Kelli Huemiller testified that she paid the bill on March 23, 2000, which was after Huemiller had been suspended (R. 1412; 2908.)
- e. Huemiller told Stubbs, and testified at the hearing, that he had purchased a used Geo Tracker through OAB. (R. 1510; 2975; 2977-78.)
- f. When Stubbs asked whether Huemiller had registered the Tracker, Huemiller said he could not remember, but if he did not register it, it was driven on OAB dealer plates. (R. 1510-11.)
- g. Huemiller clarified that in any event he did not own the Tracker very long. (R. 3071-73.)
- h. There was no evidence presented that Huemiller had ever "directed a tow to OAB" after 1995 except for the vehicle at 29<sup>th</sup> and Madison that was impounded and towed by OAB pursuant to its contract with the Strike Force.
- i. Many other OPD officers received favors or gifts from OAB. ( See ¶ 56-63 below; R. 2870, 2873-77.)

- j. Stubbs testified that it is not a violation of OPD policy if Huemiller received gifts or favors from OAB but did not direct tows to it in return. (R. 2836-37.)

Huemiller had engaged in conduct unbecoming an officer.

55. The evidence presented concerning whether Huemiller engaged in conduct unbecoming an officer was as follows:

- a. At the end of Stubbs' interview with Huemiller, Stubbs told Huemiller, "do not discuss this case, especially, with any other member of the department, unless it's a member, er [sic] unless it's an investigator assigned to the case. . . ." (R.1520.)
- b. After Huemiller had been suspended, he called Scott McGregor ("McGregor"), the senior officer on Huemiller's shift, to tell him that he would not be there that day, and if there was not another sergeant assigned, McGregor should run the briefing. (R. 3081.)
- c. Huemiller did not discuss the facts of the case with McGregor and believed he had to contact McGregor so a replacement for him could be found. (R. 3081.)
- d. McGregor testified that while Huemiller bantered with him during the call, he did not discuss the facts of the case with him. (R. 2650-53.)

*Discipline by Chief Greiner of other OPD Officers*

56. During the course of the investigation, OPD discovered that another Sergeant in OPD, Sgt. Phillips, had received free work on his vehicle from OAB and had recommended that motorists have their cars towed there. He did not receive any discipline, not even a verbal warning. (R. 2870.)

57. Officer Mills had acted improperly by asking OAB to tow a vehicle, when it was already on the scene impounding another vehicle. It was established that he had received free oil change(s) from OAB. He received no discipline. (R. 1531-32; 1539; 2807-08.)

58. The investigation also uncovered that Officer Lucero had received free repair work from OAB. He did not receive any discipline. (R. 1388; 2832-34.)

59. The investigation also uncovered that Officer Felter had free body work done on his police car at OAB. He was not disciplined. ( R. 2874.)

60. Officer Weloth was found to have improperly referred work to OAB and to have had them refer work to him. He also purchased several motorcycles from OAB. He received a letter of caution. (R. 2875.)

61. Officer Croyle was found to have driven a vehicle belonging to OAB and having dealer plates on it for three weeks. She received no discipline. (R. 2877.)

62. The Chief also learned that Lieutenant Greenhalgh had his personal car towed by OAB from Wyoming and repaired, either for a minimal fee or free. This was not even investigated and he received no discipline. (R. 2877-78.)

63. Another officer was found to have also had his patrol car repaired by OAB, without permission, in violation of OPD policy. He was “talked to.” (R. 1464; 2889-90.)

64. There are other situations in which officers misused their position and authority, and violated departmental policy, but received only minor discipline from Chief Greiner:

- a. In 1999, an officer improperly used his position to force someone to give up custody of their children. He was found to have engaged in conduct which discredited himself and the department and failed to exercise diligence and intelligence. He also lied about his involvement. He received one day off with pay. (R. 1428-30; 2879.)
- b. In 1996, ten officers were found to have engaged in off-duty employment without notifying the department, in violation of department policies. None received any discipline but were merely “talked with.” (R. 1446-54; 2881-82.)
- c. In 1999, an officer was found to have lied to a Park Ranger. He received no discipline other than being talked with. (R. 1455, 2883-84.)



- d. In 1999, three officers went into a bar where they started drinking. They then began to engage in “under-cover” activity by trying to buy illegal drugs. They ended up in a fight with other patrons of the bar. Their conduct violated numerous policies, including a prohibition about drinking on duty and conduct unbecoming to an officer. One was also found to have lied about whether he was armed during the incident. None were fired. One received two days off, another one day off and the last, six months probation. (R. 1468-93; 2884-85.)
- e. In July of 2000 an officer was found to have been seeing a women while on duty and “in his police car.” The officer receive a one-day suspension. (R. 1494-98; 2887-89.)

## SUMMARY OF THE ARGUMENT

The Decision of the OCSC should be reversed for three reasons: 1) the facts in the case do not support the charges made; 2) the charges against Huemiller do not warrant termination; and 3) Huemiller's right to due process was violated.

The Court should reverse OCSC's decision because there is not substantial evidence supporting the Decision. When considering the factual basis for OCSC's Decision, the standard of review is the substantial evidence standard. Lucas, 949 P.2d at 758. Huemiller has marshaled all the evidence, including conflicting or contradictory evidence, which might support OCSC's finding. Reviewing all the evidence demonstrates that the factual findings in this case are not supported by substantial evidence.

Second, the Court should reverse OCSC's decision because the charges against Huemiller do not warrant termination. This Court reviews OCSC's decision for proportionality and consistency. Huemiller is charged with misrepresentation of the truth and improperly sending one tow to OAB. Even if true, termination is not a proportionate sanction. The alleged discrepancies between the interviews is non-existent and the one tow is he accused of misdirecting arguably was a drug seizure. A seventeen-year veteran should not lose his livelihood for such minor missteps. Further, termination for these charges is not consistent with the punishment received by other officers who engaged in similar or worse conduct.

Finally, Huemiller's right to due process was violated. Because Huemiller was a public service employee with a vested right to his employment absent a legal cause for termination, he has a due process right to a fair hearing. Lucas, 949 P.2d at 753; see also Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing balancing test used to determine the type and amount of procedural due process required in an administrative proceeding). This due process right was violated by OCSC's rule requiring Huemiller to carry the burden of proof to *disprove* the allegations, and to present his case first. This rule contributed OPD's incentive to withhold evidence and to change its reasons for Huemiller's termination during the hearing.

OCSC's decision should be reversed for any and all of the above reasons. Accordingly, Huemiller hereby respectfully requests that the Court reverse OCSC's decision.

## ARGUMENT

### I. OCSC'S DECISION AFFIRMING HUEMILLER'S TERMINATION IS INSUFFICIENT AND MUST BE OVERTURNED

A civil service commission's review of disciplinary actions involves two questions, "1) [D]o the facts support the charges made by the department head, and, if so, 2) do the charges warrant the sanction imposed?" In re Discharge of Jones, 720 P.2d 1356, 1361 (Utah 1986)(citations omitted).

As to the first question, this Court has adopted and applied a "substantial evidence" standard of review when considering civil service commission's findings of fact. Id. Substantial evidence is defined as "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." Id. (quoting First Nat'l Bank v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990)). The record in this case makes clear that OCSC's findings are not supported by substantial evidence and do not support the charges made.<sup>1</sup>

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<sup>1</sup> To show that the findings are not supported by substantial evidence, Huemiller must marshal all the evidence, for and against him, to reach this conclusion. While Utah's appellate courts have not specifically set out the standard for marshaling evidence when a party is attacking the findings of a civil service commission, the standard employed in UAPA cases is instructive and should be applied in this case. Cf. Lucas, 949 P.2d at 758 (adopting and applying substantial evidence standard from UAPA to civil service commission's findings), Kelly v. Salt Lake City Civil Svc. Comm'n, 8 P.3d 1048 (Utah Ct. App. 2000) (applying the basic approach employed in UAPA cases to a Civil Service Commission's determination). Cases interpreting the UAPA substantial evidence standard hold, "[a] party seeking to overturn the Commission's factual findings 'must marshal [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are

A. OCSC's finding that Huemiller lied in 1996 or 2000 towing investigation is unsubstantiated.

OCSC's Decision found that Huemiller was "either not truthful in an Internal Affairs Investigation concerning adherence to Ogden City's towing procedures conducted by Assistant Chief A. K. Greenwood in January 1996, or he was not truthful in his interview on this same subject conducted by Lieutenant J. M. Stubbs on March 8, 2000." (R. 1559.) OCSC adopted Stubbs' testimony, that:

Tony subsequently refutes his initial denials by indicating he had been circumventing wrecker dispatch; he just couldn't remember if it was in 1995 but said it was before he got told not to (that would be January of 1996). He admits doing this prior to the Greenwood investigation but not after. (emphasis added *in the original*) (R. 1559.)

However, even a cursory review of Greenwood's notes from 1996 and Stubbs 2000 interview transcript belies this conclusion.

According to Greenwood's notes, he asked Huemiller "if he had ever circumvented the wrecker dispatch system *in the last year.*" (Statement of Facts, ("SOF"), 50b.) (emphasis added). Huemiller responded by stating that he had done so on two occasions. (SOF 50d.) Greenwood then asked Huemiller how this happened. Id. According to Greenwood, Huemiller "stated that on two occasions when accident victims specified

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not supported by substantial evidence.'" Whitcar v. Labor Comm'n, 973 P.2d 982, 984 (Utah Ct. App. 1998) (quoting Grace Drilling Co. v. Bd. of Review of Indus. Comm'n, 776 P.2d 63, 68 (Utah Ct. App. 1989)).

Ogden Auto Body he called them directly on his own personal phone to expedite the arrival of the wrecker.” (SOF 50e.) Greenwood’s notes also indicate that “Huemiller claims he has never ever called Ogden Auto Body or any other wrecker *unless a citizen requests them.*”(SOF 50f.) (emphasis added). Id.<sup>2</sup> Towards the end of the interview Greenwood notes, “I then asked if Tony had any other information about these allegations that I should know and he said he didn’t.” (SOF 50g.)

Stubbs’ interview, although it was on the same subject, asked different questions and obtained consistent answers from Huemiller:

Stubbs: But you have not called Ogden Auto Body, *ever*, using a cell phone to bring a tow truck to an accident scene or DUI scene.

Huemiller: Ever?

Stubbs: Or an impound?

*(There are then a few questions dealing with which phone Stubbs is referring to)*

...

Huemiller: Yes, I’ve called them before. I’ve had to call them.

(SOF 51d.)

*(There is then some discussion and Stubbs realizes he has confused the issue by including drug seizures in his question. He then asks if Huemiller has used a cell phone or other means to circumvent wrecker dispatch and get OAB to the scene.)*

...

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<sup>2</sup> It is more than a bit interesting that Greenwood did not react to Huemiller calling OAB directly when a citizen requested a specific company. One would have expected him to do so if there had been a violation of policy implicit in this activity. It would appear from Huemiller’s testimony that before the Greenwood memo in early 1995, calling wreckers directly when a motorist requested a particular company was not considered a violation of policy.

Huemiller: No. In the Strike Force, no. . . . Now we're back like four or five years. Okay? Prior to that, prior to being told that I was not to circumvent wrecker dispatch, for any reason . . .

Stubbs: When were you told that? And who told you?

Huemiller: Five years ago. Um, I don't know that I was told personally, but when one of these investigations occurred in the past we were then directed not to circumvent wrecker despatch in any way. Um, after that time I don't recall ever calling him or a tow that he wasn't already coming on. I never circumvented dispatch after that with any phone. That's why I said it's kind of, you're asking three different times in on questions."

(R. 1502.)

*(There is then a discussion as to where Huemiller had been assigned. Stubbs then gets back to the towing issue.)*

. . .

Stubbs: During the year 1995 you were calling Ogden Auto Body directly to scenes for tows without going through wrecker dispatch, weren't you?

Huemiller: I don't know if it was 95.

Stubbs: Okay, if it wasn't 95, when might it have been?

Huemiller: Before that.

Stubbs: Before that?

Huemiller: Before I was told not to circumvent wrecker dispatch.

(R. 1503.)

*(There is then a discussion as to when and by whom he was notified not to circumvent wrecker dispatch. Huemiller says it might have been Greenwood who told him but he's not sure. Then, Stubbs attempts to get Huemiller to say that he received this information during the Greenwood investigation in 1996.)*

Stubbs: So before the issue got clarified, which I'm guessing we are both in agreement, would be the A.K. [Greenwood] investigation, I'm not aware of one before that, are you?

Huemiller: I think there was one before that. Um. . .

Although the date still has not been pinned down, Stubbs then asks "So prior to [the Greenwood investigation] you were doing it [circumventing wrecker dispatch]. *After that, you did not?*" (emphasis added). Huemiller answers this compound question, "Yes." (R. 1503.)

It is at this point that Stubbs tells Huemiller that this was inconsistent with how he answered questions in the 1996 Greenwood interview. Id. He claims Huemiller has just admitted to calling Ogden Auto Body directly some time in the past, while he had told Greenwood that he had not done so. (R. 1503-04.)

This accusation is simply not supported by the testimony. Putting aside that the Greenwood interview was not taped and that verbatim notes not taken, it is clear that there were different questions asked. Greenwood asked Huemiller if he had circumvented wrecker dispatch in the past year. Stubbs question is open ended – have you ever circumvented wrecker dispatch? Huemiller admits to Stubbs that he had, prior to being told not to. This is not inconsistent. The Greenwood memo (R. 1289) detailing how tows should be handled was issued almost one year before the Greenwood interview.



Huemiller, although he was not sure of the date, told Stubbs that before this notification, he did call OAB directly when asked by a motorist. Greenwood's question was limited to the time after that memo was issued because he limited his query to the last year. In other words, Stubbs was effectively asking about a practice before 1995, while Greenwood was asking about what had occurred in 1995. These answers are consistent – the questions are not. Consistent answers to inconsistent questions do not yield substantial evidence that Huemiller “misrepresented the truth” in one of the two investigations, as OCSC's Decision maintains. (R. 1562.)

Further, even it is assumed, *arguendo*, that Stubbs and Greenwood were asking about the same period of time, there are still no inconsistencies. Huemiller admitted to Greenwood that he had circumvented wrecker despatch two times, when a specific company was requested by the motorist. Stubbs' questions ask if Huemiller had “ever” called OAB. He never asks how many times. If Stubbs was asking about the year 1995 (which he was not) Huemiller answered correctly and consistently in saying yes. Further, Stubbs and the OSCS ignore a very important statement in Greenwood's notes: “Huemiller claims he has never ever called Ogden Auto Body or any other wrecker *unless a citizen requests them.*” (italics added) (R. 330.) The irrefutable conclusion from this statement is that Huemiller admitted to Greenwood that in the past he had called wreckers directly when requested to do so by a motorist. This is absolutely consistent with what he told Stubbs:

Stubbs: During the year 1995 you were calling Ogden Auto Body directly to scenes for tows without going through wrecker dispatch, weren't you?

Huemiller: I don't know if it was 95.

Stubbs: Okay, if it wasn't 95, when might it have been?

Stubbs: Before that?

Huemiller: Before I was told not to circumvent wrecker dispatch. (R. 1503.)

Stubbs must have realized this, because during the OCSC hearing, he emphasized that Huemiller changed his story during the 2000 interview he had conducted. Stubbs testified that Huemiller had been deceptive because Huemiller first said that he did not think he ever had circumvented wrecker dispatch but later in the interview Huemiller admitted that he had done "it" before he had been told not to. (R. 3281-85.) This is simply not supported by the transcript of that interview. On the first page of the transcript, Stubbs asks Huemiller if he "*has been doing*" this - that is, sending tows unauthorized tows to OAB. (R. 1499.) Since Huemiller had not been doing this, he answers, "no." Id. On pages 4-5 of that interview (R. 1502-03), the question changed and Stubbs asks if Huemiller *has ever* circumvented wrecker dispatch. Huemiller admits that sometime in the past (before he was told not to do so), he had circumvented wrecker dispatch by calling OAB directly. Id. Again, there is no inconsistency in Huemiller's answers, as one question asks about the present and the other about the past.

Stubbs lastly claimed that Huemiller changed his story again, referring to page 18 of the interview. (R. 1516; 3285.) In the interview, Stubbs asks, "Did you *ever* request a

particular towing company without going through wrecker dispatch, absent seizures?”

Huemiller replies, “My entire career, yes.” (R. 1516.) Contrary to Stubbs’ assertions at the hearing (and any conclusion reached by OCSC), there is no inconsistency in these answers. Rather, Huemiller was forthright in admitting that in the past he had made direct phone calls to towing companies, but does not do this anymore. Stubbs also testified at the hearing that he felt that these statements were inconsistent with what Huemiller told Greenwood. (SOF 49.) As discussed above, this is simply not the case

Any analysis if the two interviews is rendered difficult by the fact that there is no reliable evidence of what Huemiller was asked or his responses when speaking to Greenwood in 1996. There is no transcript of Greenwood’s interview with Huemiller; OCSC relied only on the summary made from Greenwood’s notes.

It is also clear from the record that Huemiller was confused by the terminology used by Stubbs and maybe even by Greenwood. Stubbs asked Huemiller if he had “circumvented wrecker dispatch.” (SOF 51f.) It was clear at both the investigative interview and at the hearing that Huemiller initially felt the term “circumvented” concerned only calling a towing company directly on a phone without going through wrecker dispatch. (R. 1503-04; 1519) Huemiller admitted that he did, at times, recommend a company to a driver who then requested that company, but he apparently did not believe that this was a violation of the proper towing procedure when he was doing it.

Id.

Clearly, Stubbs personally felt that Huemiller had lied. But Huemiller provided explanations for what Stubbs believed were inconsistent statements. OCSC failed to: 1) address Huemiller's explanations for any inconsistencies in his two statements, and 2) determine whether the explanations were adequate. Instead, OCSC completely ignored the nuances of the questions and Huemiller's explanations for his responses, and simply adopted the testimony of Stubbs in order to conclude that Huemiller lied during either the 1996 or 2000 towing investigation.

**B. There is no support for the Finding that Huemiller violated policy by talking motorists into using a particular towing company.**

OCSC also concluded that Huemiller had, sometime in the past, violated towing policy. Specifically, the OCSC found two "historical violations." Huemiller admitted that in past: 1) he had called OAB directly when requested to by a motorist (R.1562), and 2) when asked his opinion by a motorist, he would recommend that the motorist use OAB. (R. 1562.) Although OCSC's Decision states that Huemiller has admitted to these violations, that is inaccurate. While Huemiller admitted to both activities, he did not admit to violating a known policy. Contrary to the OCSC's conclusion, at the time that Huemiller supposedly engaged in these activities, they were not prohibited by the department policy. It is perhaps for this reason that although the same evidence was available to Stubbs and Watt in 2000 after their investigation, neither cite to anything that shows, nor claim that either conduct violates policy in the Watt Memorandum. (R. 337-340.)

OCSC attempts to find a violation by first referencing the General Order dated February 1968 (“Order”) and the Supplement dated December 1969 (“Supplement”). OCSC’s reliance on these two documents is faulty for two reasons. First, there is no evidence that Huemiller was ever given either order, as he was not on the police force in 1968 or 1969. (SOF 12.) Rather, his testimony is that he had never seen either order prior to the appeal process. (SOF 53.) Second, neither the Order nor the Supplement prohibits the conduct to which Huemiller admits. The Order merely states that there is no longer a state wrecker service for impounds and says that a roster would be maintained by dispatch. There is no reference to how to handle specific requests by a motorist. (R. 635.)

The Supplement is somewhat more specific but seems to indicate that officers should call a towing company directly if one is requested by the motorist. In the fourth paragraph, the Chief at the time makes the following statement: “I do know that this has been a problem [referring to whether out of town wreckers can be called] and that the officers like to call the wrecker service which will respond immediately, so an officer can clear the street, make his investigation, and proceed on to his next call, because of his limited time.” (R. 636.) There is no mention as to whether an officer is prohibited from responding to a motorist’s request for a recommendation as to a towing company, other than to state that officers should not show preference in requesting a wrecking company. Id. These sections are not cited in the Decision. Likewise, the portion that is cited also does not address either type of conduct admitted by Huemiller and now questioned by

OCSC. (R. 1560.) Accordingly, even if Huemiller knew about the 1968-69 directives, there is no evidence that his conduct constitutes a violation of either the Order or Supplement.

The OCSC's reliance on the Greenwood Memorandum from 1995 is also misplaced, but for exactly the opposite reason. While that Memorandum does state that an officer should not call a towing company directly, Huemiller makes it very clear to both Greenwood and to Stubbs (See Section IA, above) that any conduct prohibited by the Memorandum took place before he received it. More accurately, Huemiller does admit to Greenwood that he did call OAB directly on two occasions in the last year. Greenwood apparently felt that such conduct was *diminimus* and determined that there was no violation. (SOF 29.) Not inconsequentially, Huemiller apparently tells Greenwood in the course of the interview that at one time he used to call wreckers directly when a motorist made a request. (Huemiller claims he has never called OAB or any other wrecker *unless a citizen requests them.*) (SOF 50.) Greenwood simply makes a note of this, and does not state that such past conduct violated policy, apparently because even Greenwood did not believe that it violated policy.

It notable that the 1995 Memorandum makes no reference to whether officers can recommend a specific towing company. Even if it had, there is no evidence that Huemiller "talked" a motorist into using OAB, or any other wrecker service, after the date of the Memorandum.

There is no evidence to support OCSC's conclusion that Huemiller violated OPD's policies in the past, because there is no evidence that there were any known policies in place which prohibited the conduct that Huemiller acknowledged. Thus, the OCSC improperly decided that Huemiller violated OPD policies which were not yet in effect.

**C. OCSC's finding that Huemiller lied concerning the 29<sup>th</sup> and Madison stop is unsubstantiated.**

Next, OCSC's Decision finds that "Huemiller also misrepresented the truth in his account of his participation in the seizure of an automobile at 29<sup>th</sup> and Madison at night." (R. 1559.) Huemiller admitted to calling OAB because he believed that the vehicle was impoundable because of the presence of drug paraphernalia. (SOF 52g-I.) Specifically, OCSC concluded that Huemiller lied because he could not have possibly seen the residue in the pipe from a distance away and because the paperwork said there were no drugs or paraphernalia in the vehicle. (R. 1559.) This conclusion was apparently based on only one thing: paperwork filled out by an Officer Hunt, which does not reference there being any drugs or drug paraphernalia in the vehicle. However, Officer Hunt was on vacation and did not testify about what happened or why he did not mention the drug pipe found by Officer Mills.<sup>3</sup> (SOF 52p.)

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<sup>3</sup> OPD also offered the testimony of Chief Greiner, who said that the Strike Force Executive Committee passed a policy, sometime before this stop, that vehicles containing only paraphernalia could not be seized. (SOF 52o.) Chief Greiner further testified that the Executive Committee then told the Strike Force commander of the new policy. (SOF 52o.) However, there is no evidence that the commander told the rank and file officers, Huemiller among them, that they could not seize vehicles that only contained

This evidence, the absence of a notation on an official document, is, at best, inconclusive, and insubstantial, in light of the evidence that was presented at the hearing. Huemiller testified that he believed the incident was a drug seizure, and that the vehicle should therefore go directly to OAB. (SOF 52g-h.) Huemiller determined it was a drug seizure because he saw the pipe, not because he saw residue in the pipe – and based upon his experience and training in the Strike Force, he believed that paraphernalia alone was enough to seize the vehicle. (SOF 52g-I.) Furthermore, according to John Valdez, retired OPD Officer, if an officer on the Strike Force encountered a vehicle with drug paraphernalia in it, the vehicle could be seized. (SOF 52j.)

Another OPD officer present at the stop, B.J. Mills, also testified. He stated that he tossed the pipe with the drug residue in the trash, because the DUI charge was a more severe offense than possession. (SOF 52k.) He also testified that Huemiller saw him search the driver. (SOF 52n.) Mills apparently did not tell Hunt about discovering the evidence before he threw it away, so Hunt's paperwork does not refute Huemiller's testimony, and Mills' testimony corroborates it.

In summary, OCSC entire conclusion that Huemiller lied about the seizure at 29<sup>th</sup> and Madison is based on the absence of a notation – an absence which is consistent with what occurred. The officer who did not complete the paperwork threw out the pipe

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paraphernalia, not drugs. Importantly, this testimony was not cited or referred to in the Decision. (R. 1557-64.)



because the DUI charge was more serious. Moreover, the testimony of both Huemiller, and Mills shows that there was drug paraphernalia present so the vehicle could be impounded, according both to Valdez's testimony and pursuant to Strike Force training. This meant that it was appropriate for Huemiller to call OAB directly. There is no evidence that Huemiller lied about the stop.

**D. OCSC's finding that Huemiller had a conflict of interest is unsubstantiated.**

OCSC also found that Huemiller had a conflict of interest in light of his fifteen-plus-year friendship with Tom Bauer, one of the owners of OAB, because Huemiller accepted favors from OAB. (R. 1563.) OCSC's Decision does not state, and OPD did not produce evidence, that Huemiller received gifts *in exchange* for diverting tows to OAB. OCSC's decision to uphold Huemiller's termination should be reversed on this, because Stubbs stated that simply *receiving* the gifts was not enough to show any violation of OPD policy unless the officer directed tows in **return** for these gifts. (SOF 54j.) OPD produced no evidence of such an arrangement between Huemiller and OAB, as the following discussion explains.

First, OPD's evidence of the favors that Huemiller may or may not have received from OAB is inconclusive at best. OCSC suggests that Huemiller intended to get free cell phone service from OAB simply because Huemiller did not pay the first bill for his new phone until after OPD began its investigation into the complaint about improper tows. (R. 1561.) However, both Huemiller and his wife, Kelli Huemiller, testified that they intended

to pay the bill all along, but no one at OAB provided them the bill until the middle of March 2000.) (SOF 50e.) The Decision also insinuates that there was something improper about the Geo Tracker that Huemiller bought from OAB, since the Decision states that Huemiller was not sure if he registered the car, and “that if he hadn’t registered it, then he drove it with dealer plates from Ogden Auto Body.” (R. 1562.) However, the evidence showed that at least one other officer received the same treatment from OAB, but no action was taken against her. See Section II. This is the full extent of what OCSC found Huemiller received. Even the investigator concluded that there were no cash payments or other gifts of significant value. R. 337-40.

Second, the only evidence OCSC found that showed Huemiller was diverting towing business to OAB was Huemiller’s admission to Stubbs that prior to being specifically told not to in approximately 1995 (and not since then), Huemiller had called OAB directly for tows when citizens requested OAB; and Huemiller’s statement to Greenwood that he had circumvented wrecker dispatch twice prior to 1996 when a citizen requested OAB.<sup>4</sup> (R. 1561.) (OCSC’s Decision states that in his interview with Stubbs, “Huemiller stated that he had, in fact, been circumventing wrecker dispatch, but he couldn’t remember if it was before or after the Greenwood investigation in January of

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<sup>4</sup> Huemiller disputes whether these recommendations, prior to Greenwood’s memo, were in contravention of any policy or procedure of OPD (SOF 29), but for this argument, it is assumed that such recommendations violated some sort of towing policy or procedure.

1996" – but this is untrue. Huemiller consistently said in the interview with Stubbs that he did not circumvent wrecker dispatch, except for drug forfeitures, after he was told not to, which he believed was in 1995. See R. 1499-1520.)

There is no evidence that Huemiller recommended OAB to drivers in exchange for a cell phone, the Tracker, or anything else. Even if, *arguendo*, Huemiller had received a free cellular phone, there is no dispute that he received the phone and began service in 2000; thus it is not plausible that he diverted two tows five years earlier in exchange for the cell phone. (SOF 54.) Similarly, there is no evidence linking the Geo Tracker with the diversion of tows (which was emphatically denied by Huemiller.) No evidence was presented as to when Huemiller purchased the Geo Tracker or whether he recieved any sort of a favorable price from OAB. Nor was there any evidence that the purchase of the vehicle was proximate in time to any improper diversion of tows to OAB from Huemiller. In short, there is no evidence of any connection between the gifts and tows. Therefore, there is simply no basis for concluding that Huemiller received any gifts in exchange for diverting towing business.

Without evidence of any such an arrangement, even if Huemiller did receive gifts from OAB, this is not evidence of a conflict of interest. In fact, the record is replete with evidence that Chief Greiner knew that many officers received gifts from OAB. For instance, Sgt. Phillips and Officer Lucero had auto work done for free at OAB, Officer Felter took his police car to OAB for free repair work, and Detective Croyle drove a

vehicle for three weeks with OAB dealer plates on it. (SOF 61.) Stubbs testified that simply receiving the gifts was not enough to show any violation of OPD policy unless the officer directed tows in return. (SOF 54j.) Because OPD does not regard receiving gifts as a basis for a conflict of interest, and there is no evidence that Huemiller diverted tows in exchange for gifts or favors, OCSC lacked substantial evidence (or any evidence) to show that Huemiller had a conflict of interest.

**E. OCSC's finding that Huemiller exhibited conduct unbecoming an officer is unsubstantiated.**

Finally, OCSC found that Huemiller engaged in “conduct unbecoming an officer” by calling a fellow OPD Officer, Officer McGregor, and “discussing” the case with him after being given a direct order not to discuss the case with another OPD member. (R. 1562.) However, the only “evidence” supporting this conclusion came from someone who was not present during the conversation. Watt testified that he thought the phone call violated Stubbs’ order and was meant to intimidate McGregor. (R. 3370-71.) None of this is substantiated by the two participants to the phone call.

Huemiller’s direct testimony was that he merely told McGregor that he had been suspended and told him what to do about the next shift’s briefing. (SOF 51 b.) Huemiller also said he had joked with McGregor by calling him a “rat” and saying that McGregor had “given him up.” (R. 3081-82; 3087-88.) McGregor also testified that Huemiller did not talk about the case with him and that he did not take the bantering as a threat. (SOF 51d., R. 1528-29.) This testimony shows that Stubbs’ order was not disobeyed. Stubbs

did not forbid Huemiller from talking to others in the Department. He only prohibited him from discussing the case with OPD personnel. (SOF 51a.; R. 1520.) Accordingly, Watt's conclusion that Huemiller had violated an OPD order was directly contrary to the evidence. Therefore, OCSC's reliance on this conclusion in finding that Huemiller had acted inappropriately is unfounded.

A careful review of the case record makes it clear that OCSC's Findings in its Decision are not supported by substantial evidence. The facts do not reach the level of "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." Lucas, 949 P.2d at 758. Because the facts do not support the charges, the decision should be reversed. Id. at 758.

## **II. THE CHARGES AGAINST HUEMILLER DO NOT WARRANT TERMINATION AND OCSC FAILS TO ADDRESS THE ISSUE OF PROPER SANCTION IN ITS DECISION**

Even if the charges against Huemiller are, *arguendo*, adequately supported by substantial evidence, they do not warrant the termination of the employment of an exemplary and highly decorated seventeen-year police officer. There are two sub-questions in analyzing whether the charges warrant the sanction: "First, is the sanction proportional; and second, is the sanction consistent with previous sanctions imposed by the department pursuant to its own policies." Kelly, 8 P.3d at 1054. Here the answers to both sub-questions are negative. Accordingly, the termination cannot stand.

**A. Termination is not proportional to the charges against Huemiller.**

“[D]iscipline imposed for employee misconduct is within the sound discretion of the Chief.” Lucas, 949 P.2d at 761. However, the Chief must be cautious not to abuse this discretion. Jones, 720 P.2d at 1363. Discretion is abused if the sanctions are disproportionate to the offense in light of all circumstances, or exceed the range of sanctions imposed by statute or regulation. Lucas, 949 P.2d at 761 (citations omitted); see also Jones, 720 P.2d at 1363 (holding that a sheriff’s disciplinary action cannot be upheld “[if] it finds the sanction so clearly disproportionate to the charges as to amount to an abuse of the sheriff’s discretion”). In this case, Chief Greiner abused his discretion when he terminated Huemiller; termination was too harsh in light of the length and quality of Huemiller’s service and the nature of the alleged wrongdoing.

There are basically four charges against Huemiller sustained by OCSC – misrepresentation of the truth (not telling the truth to Greenwood in 1996), violating OPD towing policies (by having a vehicle impounded at 29<sup>th</sup> and Madison and suggesting that drivers use OAB prior to 1995), being friends with the owner of OAB and receiving some minor favors from him, and talking with a fellow officer (but not about the investigation) after the Stubbs’ interview. Of these four charges, OPD has only ever contended that termination is warranted for only two.

First, OPD claims it has a “zero tolerance” policy for untruthfulness during internal investigations. (R. 96, 2572, 3486.) However, OPD’s policy regarding interviews in

internal affairs investigations is actually more lenient. “Refusal to answer or answering falsely is cause for disciplinary action, including termination from the department.” (R. 565; 3365.) Second, Stubbs testified that simply violating the towing policy or receiving a favor from a towing company was not sufficient to warrant termination. Rather, officers could be fired for violating the towing policy only if they had been directing towing business in exchange for gifts or favors. (SOF 54j.) Carefully examining these two charges shows that termination was grossly disproportionate to the nature of the offense.

As to the first charge, that Huemiller misrepresented the truth (the term that OCSC’s Decision uses repeatedly) is, at best, based on a careful parsing of the Greenwood and Stubbs interviews. In the 2000 interview, Stubbs asked Huemiller if he had called OAB directly for tows prior to 1995 and Huemiller supposedly answered in the affirmative.<sup>5</sup> (SOF 51.) Stubbs (and evidently OCSC as well) concludes that this answer varied from what he had told Greenwood in 1996. Apparently (and this term is used because the OCSC’s Decision does not explain what misrepresentation it believes occurred), both Stubbs and OCSC reach this conclusion because in 1996 Huemiller had said that he had only circumvented wrecker dispatch on two occasions prior to 1996. (SOF 51.) There is no indication from Greenwood’s notes that he asked Huemiller the same question that Stubbs asked in the year 2000. Further Greenwood also noted that

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<sup>5</sup> We use the term “supposedly” because Huemiller never really answers the question - one can only infer his answer from the transcript.

“Huemiller claims he has never ever called Ogden Auto Body or any other wrecker unless a citizen requests them” which seems to almost identical to what he told Stubbs in his interview: “[A]fter that time [the Greenwood Memorandum] I don’t recall ever calling him [OAB] for a tow that wasn’t already coming in.” (SOF 51.)

In short, if there is a discrepancy in answers, it is minor. There is no list of the questions Greenwood asked Huemiller, and no list of the answers Huemiller gave. (SOF 26.) Further, Stubbs did not speak with Greenwood about his 1996 investigation; instead he relied on the summary. (R. 3312-13.) This is why OCSC could not conclude definitively that Huemiller had lied.

This case is similar to the situation in Lucas, 949 P.2d 746, where this Court found that a police officer’s termination, which was partially based on a dishonesty charge, was a disproportionate sanction. Id. The Court noted that the charge was never conclusively determined and that “the evidence supporting the dishonesty charge was slim and inconsistent.” Id. at 762. The police officer, who had been with the Murray City Police for over eleven years, was fired for allegedly lying during an internal affairs investigation. Id. at 749. The investigation arose from an allegation that Lucas used excessive force while searching an arrestee. Id.

Lucas was interviewed twice during the investigation. In the first interview, Lucas stated that he believed that he had started to pull his gun out, but that he had left it in the holster. Id. at 750. Later, in a polygraph test, Lucas stated that he “still perceived that his



gun was holstered, but that he had no reason to doubt” another officer’s statement that Lucas had his gun out of his holster. Id. Finally, at the pretermination hearing, Lucas testified that his perception of the event was that his gun was in the holster. He acknowledged that he was ready to take his gun out of the holster, as he was trained to do when faced with a potential threat such as this arrestee, who may be carrying a weapon. The position of Lucas’ gun – in the holster or out of the holster – was never conclusively determined. Id. at 762. The Court held that “the Commission’s finding that Lucas lied is not supported by substantial evidence. However, even if we were to assume that Lucas lied about the position of his gun . . . dismissal for the charge of dishonesty under these circumstances is neither compelled nor supported by the record.” Id. at 761.

Likewise, OCSC has not conclusively determined what evidence substantiates the charge of misrepresenting the truth at the interviews. Thus, all that is left is possibly disparate answers by Huemiller at the two interviews. However, it has never been established that Huemiller was asked the same questions. As in Lucas, even if Huemiller’s answers were not totally consistent, it still does not warrant termination.

Regarding the issue of favors for tows, OCSC did not conclude that Huemiller exchanged favors for tows. Instead, the Decision simply states that Huemiller, by recommending towing companies to drivers prior to 1995, violated the policy or procedure for calling wreckers to tow autos. (SOF 48.) OCSC concluded that Huemiller received favors from OAB but does not link it to diverting towing business.

Sergeant Huemiller's personal interest in being loyal to his friend, Tom Bauer [sic], an owner of Ogden Auto Body, by diverting towing business to that company and by accepting favors from him was in conflict with his professional interest and duty to follow Ogden Police Department policies and procedures.

(R. 1563.) Because there is no evidence to suggest that his actions prior to 1995, in recommending towing companies to drivers was in exchange for any favors received by Huemiller, OCSC does not conclude that there was somehow a payoff to Huemiller for his pre-1995 actions.

As to the 29<sup>th</sup> and Madison stop, there was also no showing that what occurred was more than Huemiller being too vigorous in determining that it was a drug seizure. There was no showing that Huemiller called for the car to be impounded as a result of any gifts he received from OAB. Rather, the evidence at the hearing was that impounds were not lucrative, as the car had to be stowed for a long period of time and did not lead to any lucrative repairs. (R. 2743-44; 2748-49.) Based upon Stubbs testimony that receiving gifts or favors, without a causal connection to referring towing business, was not a terminable offense. Therefore, Huemiller should not have been fired.

Even taking all of the charges as a whole, termination was abusively harsh. Huemiller was a seventeen-year veteran of outstanding merit. He had never been previously warned or disciplined for any similar misconduct. (SOF 8.) He had spent the better part of the previous decade assigned to the Special Task Force, where the standard procedure was to call OAB directly. (SOF 18.) There was no proof ever submitted to

show that Huemiller was either on the “take”, did anything wrong (other than perhaps exercising poor judgment at 29<sup>th</sup> and Madison and in calling McGregor), or outwardly lied. To destroy a career under these circumstances is an abuse of discretion.

**B. Termination is not consistent with previous sanctions imposed by Chief Greiner.**

The termination of Huemiller was not consistent with previous (and concurrent) sanctions imposed by OPD. OPD must follow its own policies and administer discipline fairly and consistently. An employee before a civil service commission has the burden “to establish a prima facie case that the Chief acted inconsistently in imposing sanctions by presenting sufficient evidence from which the Commission could reasonably find a relevant inconsistency.” Kelly, 8 P.3d at 1056. In this case, Huemiller presented substantial evidence showing that there was “some meaningful disparity of treatment between [the terminated employee] and other similarly situated employees.” Id. Huemiller has presented such evidence.

Other officers engaged in conduct at least as bad – if not worse – than Huemiller’s, yet received nothing more than a slap on the wrist. Numerous officers received free work and other perks from OAB. Some of these even admitted to directing towing business to OAB and/or referring work to OAB. Yet, unlike Huemiller, none of these officers received anything harsher than a letter of caution.

Sgt. Phillips had extra work done on his vehicle at OAB and did not pay for it. (SOF 56.) Phillips admitted in the Stubbs investigative interview that he continues to

recommend specific wreckers, including OAB, to drivers who do not know what towing company to choose; Stubbs said this was not a violation and did not submit it to Chief Greiner for discipline. (R. 2839.) Further, Chief Greiner was aware of Phillips' recommending towers and getting free work done on his vehicle but did not assign anyone to investigate him, nor did he discipline Phillips. (SOF 56.) Another officer, Mills, violated towing procedures when he asked OAB to tow a vehicle at a scene where OAB was already picking up another vehicle involved in a drug seizure. (SOF 57.) Further, Mills admitted that he had also had received a free oil change from OAB on his personal vehicle (SOF 57.) Although Stubbs submitted the incident for discipline, Chief Greiner did not discipline Mills.<sup>6</sup> (SOF 57.)

Other officers were found to have either accepted gifts or violated towing procedure in favor of OAB. Specifically, Officer Lucero had some free work done at OAB; he was not disciplined. (SOF 58.) Officer Felter had free work done on his police vehicle at OAB. (SOF 59.) He received a Notice of Caution indicating that there was a "discussion with employee" indicating Felter's actions "present[] an image of the department that is not consistent with the image we wish to project to the public and has

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<sup>6</sup> Huemiller requested that OPD provide all discipline imposed on all OPD personnel since Greiner has been Chief. (R. 76-78.) After OCSC granted Huemiller's Motion to Compel that evidence (R. 193-195), Huemiller's attorneys reviewed all the documents provided by OPD and identified as exhibits all those disciplinary records that involved similar violations of policies for which Huemiller had been accused. (R. 1448-98.)

allowed for undue criticism of the department . . .” (R. 1464.) Officer Whetlock referred work to OAB and in return they referred work to him. He also purchased several motorcycles from OAB. (SOF 60.) He received a letter of caution, but was not suspended or fired. (SOF 60.) Officer Coyle drove a vehicle with OAB plates on it for at least three weeks; she was never disciplined. (SOF 61.) A member of management, Lieutenant Greenhalgh even had his vehicle towed from Wyoming and repaired either for free or for a reduced amount at OAB. The matter was never investigated, nor was he disciplined. (SOF 62.)

In short, each one of these officers’ conduct was at least as objectionable as Huemiller’s. Further, unlike Huemiller, several admitted that they directed tows to OAB because of the perks and benefits they received. Yet, only one of them even received a letter of caution. OPD presented no evidence as to why those transgressions were shrugged off while Huemiller was terminated. To be consistent in its punishment, OPD should have given Huemiller nothing more than a letter of caution for receiving gifts and recommending towing companies to drivers before 1995.

In addition to Chief Greiner’s discipline, or lack of, handed out related to towing issues, Chief Greiner disciplined officers in several situations that were analogous to OCSC findings against Huemiller regarding misrepresenting the truth. In one situation, an Officer lied about and misused his authority to get a third party to give up custody of a child. (SOF 64a.) In another, an officer lied to another law enforcement representative.

(SOF64c.) Finally, ten officers lied by failing to notify the department that they were engaging in off-duty employment. Only one of these officers received anything more than a “talking to,” and he received only one day off. (SOF 64 a-c). In contrast, Huemiller, who allegedly was inconsistent in his responses to different questions in two interviews four years apart, was terminated. No justification for this inconsistency was given by OPD.

Further, even officers who engaged in multiple acts of misconduct were not fired by Chief Greiner. For example, the officer who used his position to help someone else get custody of another officer’s child by coercing someone, did not report that another police officer had engaged in potentially criminal activity. (R. 1428-31.) He was disciplined with one day off without pay and six months’ probation, even though the officer’s action put OPD in a “potentially libelous situation.” (R. 1428.) Three officers involved in a fight at a bar received, in order of severity, a two-day suspension, a one-day suspension, and a formal letter of reprimand plus six months probation. (R. 1922, 1468-70.) These three officers were not simply fighting, but were also drinking on duty when the altercation took place. The officers were in violation of both Strike Force and OPD policy. (R. 1468-70.) Additionally, one of the officers (the one who got a two-day suspension) engaged in “conduct unbecoming and officer”<sup>7</sup> when he challenged someone in the bar to fight by throwing off his badge and telling the person, “Now, I’m not a cop.” Another of the

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<sup>7</sup> OCSC found that Huemiller engaged in “conduct unbecoming an officer” when he called Scott McGregor.

brawling officers (one-day suspension) lied to police when they responded to investigate the brawl. When asked if he was armed, the officer involved in the brawl said, "No," even though he had his sidearm on him. (R. 1469; 1491.) That officer also lied to another police officer to avoid getting into trouble. (R. 1491.)<sup>8</sup>

Comparing Chief Greiner's discipline of the officers outlined above with Huemiller's termination, it is clear that the termination is inconsistent and far too harsh. The above facts demonstrate that even officers in similar factual situations were not terminated: officers who took gifts in exchange for directing tows to OAB were not fired; officers who lied were not fired; officers who engaged in multiple offenses, including physical altercations, drinking on duty and lying were not terminated. Indeed, no one received anything more than two days off. Even if Huemiller's conduct is viewed as seriously deficient, there is clearly disparity in treatment between Huemiller and other officers -- disparity without explanation.

Because Greiner's termination of Huemiller was neither proportional nor consistent, OCSC's decision must be reversed.

### **III. OCSC'S RULE THAT HUEMILLER DISPROVE THE CHARGES AGAINST HIM WAS HIGHLY PREJUDICIAL AND VIOLATES HIS RIGHT TO DUE PROCESS**

In Utah, it is well established that a civil service employee, in this case a city police officer, has a "vested right to continued employment absent a legal cause for termination."

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<sup>8</sup> Of all the officers in the records given Huemiller, only one was terminated. Importantly, the termination was for engaging in potentially criminal activity. (R. 2880.)

Lucas, 949 P.2d at 753 (Utah Ct. App. 1997). This vested right, a property interest, in continued public employment is protected by the Due Process Clause of the Fourteenth Amendment and by the Utah Constitution. U.S. Const., amend. XIV, sec. 1; Utah Const., art. 1, sec. 7. Id. at 752. Where a post-termination hearing is provided for by statute, as it is in this case, the procedure “must comport with due process requirements providing for a fair hearing.” Utah Code Ann. § 10-3-1012(2); Lucas, 949 P.2d at 753 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1995), Bunnell v. Indus. Comm’n, 740 P.2d 1331, 1333 (Utah 1987)). The Utah Supreme Court has also recognized that even in an administrative hearing, litigants have a right to due process. “Every person who brings a claim in a court or at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal.” Tolman v. Salt Lake County Attorney, 818 P.2d 23, 28 (Utah App. 1991) (quoting Bunnell, 740 P.2d at 1333).

The United States Supreme Court has noted that, “due process is flexible and calls for such procedural protections as the particular situation demands.” Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (internal cites omitted). In the Mathews decision, the court set out a three-part test for evaluating the fairness of due process in a given situation, weighing the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function



involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The United States Supreme Court used this balancing test to determine what process is due a discharged employee with the right to continued employment in Loudermill, 470 U.S. at 542-43.

In analyzing the Mathews factors, it is plain that OCSC denied Huemiller due process by requiring him to *present evidence first and disprove the allegations made against him*. This allowed OPD to both withhold evidence against Huemiller and to switch the theory of its case during the hearing. Additionally, OCSC would have no substantial administrative or fiscal burden, nor would OPD, if OCSC required OPD to prove the allegations against Huemiller.

**A. Huemiller had an important interest in his career as an Ogden police officer.**

The first Mathews factor is the private interest affected by the official action. Here, like in Loudermill, Huemiller's private interest is his property and liberty interests in his continued public employment with OPD. The United States Supreme Court recognized these particular private interests as significant. Loudermill, 470 U.S. at 543 ("We have frequently recognized the severity of depriving a person of the means of livelihood.") Huemiller's interest in preserving his seventeen-year career includes maintaining his income, being able to collect his pension – which he was only three years away from earning, and maintaining his reputation in the community. Thus, Huemiller's "private

interest” in his continued employment with OPD is compelling and substantial in this case.

**B. OCSC’s rule requiring Huemiller bear the burden of proof substantially increased the risk it would erroneously deprive him of his employment.**

Administrative proceedings are different from formal judicial proceedings, in part because they are more flexible. However, this flexibility does not obviate the “necessity of preserving fundamental requirements of procedural fairness in administrative hearings.” Tolman, 818 P.2d at 28, (citing Nelson v. Dep’t of Employment Sec., 801 P.2d 158, 163 (Utah App. 1990)). To preserve the fundamental requirement of procedural fairness, administrative agencies must adhere to certain safeguards. For example, “All parties must be fully apprised of the evidence submitted or to be considered, and must be given an opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.” Id. at 29, (citing Dep’t of Cmty. Affairs v. Utah Merit System Council, 614 P.2d 1259 (Utah 1980)). Accordingly, in evaluating the second Mathews factor, a court reviewing a civil service commission’s decision must also examine whether the hearing procedures increased the risk that the commission would erroneously uphold an employee’s termination.

OCSC Rule 10-6 requires Huemiller to present his evidence first and *disprove the charges against him*:

The procedure at the hearing shall require that the appellant first establish the grounds on which he or she relies to disprove the action taken by the appointing authority which he or she considers creates the adverse affects.[sic] Following the

appellant's case, the City may enter its rebuttal evidence.  
(emphasis added)

OPD was excused from having to present even a prima facie case supporting its charges, which was clearly prejudicial.

**1. Prior to the OCSC hearing, OPD withheld from Huemiller complete evidence of the charges against him.**

One factor courts should look at to see if the administrative procedure increased the risk of unfair deprivation of employment is whether the employer provided the employee full access to all information relied upon in making the adverse decision. See Mathews, 424 U.S. at 345-46.

By requiring Huemiller disprove the charges against him, OCSC provided OPD an incentive to withhold from Huemiller a full explanation of the reasons for his termination and the evidence used as a basis for those reasons. It could, and did, simply lie in wait to attack Huemiller's case without first presenting a prima facie case. Here, Huemiller never received a full explanation of the charges against him either before the hearing or before he was called on to respond to the charges in the hearing. Instead, Huemiller had to try to piece together OPD's case against him from the inadequate discovery OPD provided.

OPD resisted Huemiller's pre-hearing efforts to obtain the full investigative notebook, created during the internal affairs investigation, which fully explained OPD's supportive evidence of the allegations against him. (SOF 38.) Although Huemiller won a pre-hearing Motion to Compel the discovery of all relevant documents, OPD resisted and

never produced the investigative notebook in the form which was used by OPD witnesses on the stand while testifying. Finally, at the OCSC hearing, it became clear to Huemiller that OPD still had not produced everything contained in the investigative file and other pertinent evidence. (SOF 38.) During the hearing, witnesses for OPD testified to evidence that Huemiller and his counsel had never seen. For example, Huemiller had never been given the tape recordings made during the internal affairs investigation, of investigative interviews conducted by Lt. Stubbs (R. 2798), the towing company dispatch logs (R. 2810-11) which might have shown that the logs were being tampered with by someone other than Huemiller (Id.), the complete investigative notebook (SOF 38), the officer training program manual which supposedly containing training materials on proper towing procedures (R. 2866-67), and the supplemental investigative report of a detective who worked on the internal affairs investigation explaining the testimony of a driver of a vehicle involved in a tow that Huemiller was accused of sending to OAB improperly (R. 3208; 3229-30.) Huemiller's ability to meet his burden of proof in the hearing depended in large part on deciphering the initial memorandum to Balls from Watt. The investigative notebook was the key to the Watt Memorandum. The "findings" in the Watt memorandum consisted of vague recitations of the allegations against Huemiller, whether the allegations were sustained or unfounded, and specific section and page number references to the investigative notebook, which identified the evidence supporting the finding. Although OPD gave Huemiller a copy of the Watt Memorandum before his pre-termination hearing,

the Watt Memorandum was useless to him, since he did not have the notebook to look up the evidence OPD used to sustain the allegations against him. (SOF 37.)

For example, in the Watt Memorandum, OPD sustained Allegation 3, which said, “The above named officers<sup>9</sup> have a ‘special relationship’ with Ogden Auto Body in which the Baur’s [sic] provide gifts in return for the tow business sent to them.” But the Watt Memorandum provided no explanation of the evidence supporting the allegation. It only stated:

[T]here is substantial evidence of “gifts”, to include [sic] free cell phones, deals on vehicles and vehicle repairs, use of vehicles with dealer plates and other favors provided to Sgt. Huemiller, by Ogden Auto Body and Tom Baur [sic], as a result of the practice of sending unauthorized tows to Ogden Auto Body.

(R. 338.) The Memorandum then cited to the investigative notebook, which Huemiller did not have.<sup>10</sup> (Id.) The investigative notebook is the key to unlocking the cryptic memorandum but Huemiller was never given this key before the hearing, notwithstanding his repeated requests for it. (SOF 38.)

Thus, it was impossible for Huemiller to understand, going into the hearing, which phones were a problem, which vehicles and repairs OPD claimed he got “deals” on, when

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<sup>9</sup> The Watt Memorandum included reference to two other OPD officers fired at the same time as Huemiller.

<sup>10</sup> Specifically, it read: “References as follows; Part 2, Sec. A., pg. 4; Part 2, Sec. B., pg. 10-13; Part 2, Sec. D., pg’s. 1-13; Part 2, Sec. F., pg. 2, pg. 4; Part 4, Sec. B., pg. 38; Part 5, Sec. B., pg. 1, pg. 10, pg. 14.”

and on which vehicles OPD thought he used OAB dealer plates, and what “other” favors OAB gave him. Essentially, without the investigative notebook in its fully assembled and complete form, it was impossible for Huemiller to defend himself against the charges. Because Huemiller bore the burden of *disproving* the allegations against him and OPD was able to deny Huemiller full access to all the information it relied on in his termination, Huemiller was at a huge disadvantage at the hearing, thereby exponentially increasing the risk of an erroneous deprivation of his job. These problems would have been at least minimized if OPD had to present its case first and had the burden of proof.

**2. By requiring Huemiller to present first at the hearing, OPD was able to shift its reasons for Huemiller’s termination.**

During the termination hearing, after Huemiller presented his case disproving OPD’s arguments against him as he understood them, OPD was able, because of Rule 10-6, to change the focus of the case. Huemiller could not anticipate or rebut all of the potential, ever-shifting arguments against him because he was not aware of them until the hearing.

Huemiller understood, based upon the evidence provided by OPD before the hearing, that he was fired because OPD believed he went around established OPD towing policy in order to divert towing business to OAB in exchange for favors from OAB. (R. 338.) After Huemiller disproved those allegations, OPD switched the focus of the case from taking gifts and circumventing towing procedure to lying to police officials. Prior to the hearing, OPD identified the search at 29<sup>th</sup> and Madison as evidence that Huemiller was

diverting tows to OAB improperly. During the hearing, Huemiller presented evidence that drugs were found on someone in the vehicle, so the tow was no longer evidence of tow diversion. However, when OPD presented its “rebuttal”, it used this incident as support for its position that Huemiller had lied about why he called OAB; OPD suggested that Huemiller could not have seen the drug paraphernalia at the search. This is an argument Huemiller could not have and did not anticipate because nowhere in the pre-hearing proceedings did OPD say that this was a basis for Huemiller’s termination.

OPD’s tactic worked quite well. OCSC’s Decision, upholding OPD’s termination of Huemiller, is based largely upon OCSC’s conclusion that Huemiller misrepresented the truth during either the Greenwood investigation in 1996 or the Stubbs investigation in 2000,<sup>11</sup> and that he lied about why he called OAB during the incident at 29<sup>th</sup> and Madison. The Decision places little emphasis on Huemiller’s alleged “towing for favors” (and did not provide any specific instances of Huemiller’s doing so). (R. 1557-64.)

There are other ways in which putting the burden on Huemiller was prejudicial. U.C.A. § 10-3-1012(1) states that protected employees, such as Huemiller, can only be terminated if they engage in misconduct, violate policies or rules, or fail to perform their duties. In other words, there must be “cause” or “just cause” for the termination. This necessarily implies that there must be a finding that they have done something wrong.

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<sup>11</sup> It is interesting that neither OPD nor OCSC could ever make up its collective mind as to where the lies occurred.

Placing the burden on the employee turns this analysis on its head. The focus becomes not whether there was wrongdoing, but whether the employee is clever enough to show that the accusations made against him or her are faulty. That is antithetical to the concept of civil service as set forth in the act. Employees in the civil service are to be protected and retain their jobs unless, and until, it has been shown that they did something seriously wrong.

Switching the burden of proof also distorts how the evidence is analyzed. The case law is clear that there must be at least substantial evidence to support the charges (see Section I, above). If the employee bears the burden of proof does this mean that he must present substantial evidence to show no wrong doing, or is his burden even greater? What if the employee presents substantial evidence, but the hearing panel chooses to disbelieve it (as happened here with the 29<sup>th</sup> and Madison stop), even though the conflicting evidence (a lack of notation regarding drug paraphernalia) is minimal at best? Does this mean that although there is not substantial evidence supporting the employer's position, that the employer still wins? This seems to contradict prior holdings of this court addressing administrative rulings.

Putting the burden on the employee also seems to cast that employee as a wrongdoer from the beginning. Rule 10-6 effectively says that an employee is guilty until proven innocent. This necessarily affects the way the commission views the employee. Just as a prisoner does not have to appear before the jury in prison garb, an employee



should not be required to be clothed in the mantle of guilt. It is fundamentally unfair to make the party who has the least resources and access to the evidence bear the burden of proof.<sup>12</sup> All of these issues are of great importance in an administrative hearing where there already exists a great deference to the actions of the employer, and a natural reluctance to intervene and overturn a decision made, in many cases, by an elected official.

OCSC's Rule 10-6 allows for severe infirmities in the administrative hearing process. Those infirmities, as demonstrated in this case, substantially increase the risk that an employee will be erroneously deprived of his or her employment.

3. **There is little, if any, administrative strain placed on either OCSC or OPD if OPD is required to bear the burden of proof.**

Under the third factor of the Mathews balancing test, the Court must evaluate the fiscal and administrative burden to the government of requiring OCSC remedy its procedural deficiencies. Here, switching the burden of proof puts minimal strain on OCSC relative to the "benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just . . . ." Mathew, 424 U.S. at 348. Indeed, it is hard to imagine how the shifting of burdens would increase the burden on the city, which had to go through a multi-day hearing in any event.

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<sup>12</sup> There are additional disadvantages for an employee in these hearings. In most cases, they cannot afford competent legal counsel, while the municipalities are provided counsel by their insurance companies. Further, the employer controls the relevant evidence, and, as here, may be parsimonious at best in sharing it with the employee.

Other Utah civil service commissions require that the employer bears the burden of proof when an employee is disciplined in any way, let alone terminated. For example, Salt Lake County's Career Service Council's Guidelines and Operating Procedures provide, "The burden of proof and the burden of proceeding shall be on the department [of county government] in cases involving disciplinary action . . . ." Rule 6.1. Utah state governmental entities, through statute, have a similar burden:

2(a) The agency has the burden of proof in all grievances resulting from dismissals, demotions, suspensions, written reprimands, reduction in force, and disputes concerning abandonment of position. . . .

(c) The party with the burden of proof must prove their case by substantial evidence.

Utah Code Ann. § 67-19a-406.

It is no more burdensome for Ogden to have the burden of proof and presentation than it is for other municipalities. There is no reason that such a shift would present a greater financial burden on either the employer or OCSC. As argued above, Rule 10-6 is unfair to Huemiller, and other Ogden employees that must submit to it, while the cost of requiring the employer bear the burden of proof when an employee is terminated is no greater than when it prepares to respond to the employee's case-in-chief. This would remedy the obvious disadvantages to Huemiller.

Applying the Mathews balancing test here demonstrates that OCSC's rule requiring the aggrieved employee to disprove the charges against him violates due process.

Huemiller has a property interest in maintaining his employment at OPD – an important

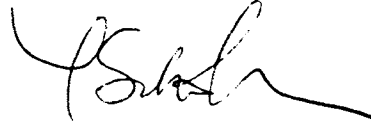
and well-established private interest. There is a high risk that he will be (and was) erroneously deprived of that right because of OCSC's rule requiring he bear the burden of proof. In comparison, the administrative and fiscal burden to either OPD or OCSC of requiring OPD to shoulder the burden of proof is low. Shifting the burden of proof to the employee is a violation of due process. See, generally, Townsel v. San Diego Metro Transit Development Board, 65 Cal. App. 4<sup>th</sup> 940 (Ca. App. 1998); Soles v. City of Raleigh Civil Service Commission, 119 N.C. App. 88, 97 (N.C. App. 1995) ("We hold that the procedures utilized by the City and the Commission in terminating Soles' employment were constitutionally infirm. Specifically requiring Soles to establish by the greater weight of the evidence that his termination was unjustified . . . violated his right to procedural due process.") And it is contrary to one of the most fundamental principles of American jurisprudence – that one is innocent until proven guilty.

### CONCLUSION

As set forth above, OCSC's Decision affirming Huemiller's termination from OPD must be reversed. First, there is not substantial evidence to support the charges against him. Even if there was such evidence, the penalty of termination is not appropriate and constitutes an abuse of discretion. Finally, the OCSC's own rule deprived Huemiller of a full and fair hearing. Therefore, the Decision must be reversed.

DATED this 22 day of December, 2003.

STRINDBERG & SCHOLNICK, LLC

A handwritten signature in black ink, appearing to read "Erik Strindberg", written over a horizontal line.

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ERIK STRINDBERG  
LAUREN I. SCHOLNICK  
Attorneys for Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of **BRIEF OF PETITIONER** to be hand delivered, this 22 day of December, 2003, to:

Stan Preston  
Judith Wolferts  
Camille N. Johnson  
Snow, Christensen & Martineau  
10 Exchange Place, #1100  
Salt Lake City, Utah 84111

and to be delivered by U.S. Mail, postage pre-paid, this 22 day of December, 2003 to:

Doug Holmes  
274 ½ 25<sup>th</sup> Street  
Ogden, Utah 84401



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## **ADDENDUM**

The 14<sup>th</sup> Amendment to the United States Constitution

Article I, Section 7 of the Utah Constitution

Memorandum from Chief A.K. Greenwood (May 31, 1995) (R. 1289)

Greenwood Investigative Report (February 7, 1996) (R. 1364-80)

Stubbs' Interview of Huemiller (March 8, 2000) (R.1499-1520)

Internal Affairs Investigation (April 21, 2000) (R. 337-40)

Findings of Fact, Conclusions of Law, and Order (November 21, 2001) (R.1557-

64)

# **THE 14<sup>TH</sup> AMENDMENT TO THE UNITED STATES CONSTITUTION**

**Art. 1. [Slavery prohibited.]**

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

**[Power to enforce amendment.]**

Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XIV**

Section

1. [Citizenship — Due process of law — Equal protection.]
  2. [Representatives — Power to reduce appointment.]
  3. [Disqualification to hold office.]
  4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
- [Power to enforce amendment.]

**Section 1. [Citizenship — Due process of law — Equal protection.]**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Sec. 2. [Representatives — Power to reduce appointment.]**

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**3. [Disqualification to hold office.]**

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]**

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave;

but all such debts, obligations, and claims shall be held illegal and void.

**Sec. 5. [Power to enforce amendment.]**

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**AMENDMENT XV**

Section

1. [Right of citizens to vote — Race or color not to disqualify.]
2. [Power to enforce amendment.]

**Section 1. [Right of citizens to vote — Race or color not to disqualify.]**

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

**Sec. 2. [Power to enforce amendment.]**

The Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XVI****[Income tax.]**

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

**AMENDMENT XVII****[Election of senators.]**

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

**AMENDMENT XVIII**

[REPEALED DECEMBER 5, 1933. SEE AMENDMENT XXI, SECTION 1.]

Section

1. [National prohibition — Intoxicating liquors.]
2. [Concurrent power to enforce amendment.]
3. [Time limit for adoption.]

**Section 1. [National prohibition — Intoxicating liquors.]**

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

**Sec. 2. [Concurrent power to enforce amendment.]**

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.



# **ARTICLE I, SECTION 7 OF THE UTAH CONSTITUTION**

## CONSTITUTION OF UTAH

### PREAMBLE

#### Article

- I. Declaration of Rights
- II. State Boundaries
- III. Ordinance
- IV. Elections and Right of Suffrage
- V. Distribution of Powers
- VI. Legislative Department
- VII. Executive Department
- VIII. Judicial Department
- IX. Congressional and Legislative Apportionment
- X. Education
- XI. Local Governments
- XII. Corporations
- XIII. Revenue and Taxation
- XIII. Revenue and Taxation [Proposed]
- XIV. Public Debt
- XV. Militia
- XVI. Labor
- XVII. Water Rights
- XVIII. Forestry
- XIX. Public Buildings and State Institutions
- XX. Public Lands
- XXI. Salaries
- XXII. Miscellaneous
- XXIII. Amendment and Revision
- XXIV. Schedule

### PREAMBLE

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION.

1896

### ARTICLE I

#### DECLARATION OF RIGHTS

#### Section

1. [Inherent and inalienable rights.]
2. [All political power inherent in the people.]
3. [Utah inseparable from the Union.]
4. [Religious liberty.]
5. [Habeas corpus.]
6. [Right to bear arms.]
7. [Due process of law.]
8. [Offenses bailable.]
9. [Excessive bail and fines — Cruel punishments.]
10. [Trial by jury.]
11. [Courts open — Redress of injuries.]
12. [Rights of accused persons.]
13. [Prosecution by information or indictment — Grand jury.]
14. [Unreasonable searches forbidden — Issuance of warrant.]
15. [Freedom of speech and of the press — Libel.]
16. [No imprisonment for debt — Exception.]
17. [Elections to be free — Soldiers voting.]
18. [Attainder — Ex post facto laws — Impairing contracts.]
19. [Treason defined — Proof.]
20. [Military subordinate to the civil power.]
21. [Slavery forbidden.]
22. [Private property for public use.]
23. [Irrevocable franchises forbidden.]
24. [Uniform operation of laws.]
25. [Bills of attainder and ex post facto laws.]

#### Section

26. [Provisions mandatory and prohibitory.]
27. [Fundamental rights.]
28. [Declaration of the rights of crime victims.]

#### Section 1. [Inherent and inalienable rights.]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

1896

#### Sec. 2. [All political power inherent in the people.]

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

1896

#### Sec. 3. [Utah inseparable from the Union.]

The State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land.

1896

#### Sec. 4. [Religious liberty.]

The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

1899

#### Sec. 5. [Habeas corpus.]

The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.

1896

#### Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

1984 (2nd S.S.)

#### Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

1896

#### Sec. 8. [Offenses bailable.]

(1) All persons charged with a crime shall be bailable except:

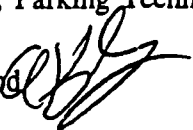
- (a) persons charged with a capital offense when there is substantial evidence to support the charge; or
- (b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or
- (c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person constitutes a substantial danger to any other person

**MEMORANDUM FROM CHIEF A.K. GREENWOOD  
MAY 31, 1995 (R. 1289)**

CONFIDENTIAL

MEMORANDUM FROM THE POLICE DEPARTMENT  
Administration

TO: All Uniform Officers, Parking Technicians

FROM: Chief A.K. Greenwood 

DATE: May 31, 1995

SUBJECT: Wrecker requests

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Under no circumstances will an officer request a specific wrecker service. When the owner requests a specific wrecker, that owner's name will be given to the dispatch center at the time of the request. Wreckers that arrive at an accident scene on their own will not be allowed to tow the vehicles.

Officers will not call wreckers directly by phone or any other means to avoid going through the dispatch center and the wrecker dispatch. All impounds and accident tows will be made through our dispatch center and proper documentation made.

Should an emergency arrive that an exception needs to be made, only the sergeant on duty or the Duty Lieutenant may waive the normal rotation and a specific request be made. This also must go through the dispatch center and documentation made.

Drug related impounds where a hold has been placed on the vehicle for the Strike Force will be done by Intermountain Auto. Again, proper documentation must be made through the dispatch center.

AKG/loh



0000033

**GREENWOOD INVESTIGATIVE REPORT**  
**FEBRUARY 7, 1946 (R. 1363-80)**

# MEMORANDUM FROM THE POLICE DEPARTMENT

Support Services Division

CONFIDENTIAL

TO: Chief Jon J. Greiner

FROM: Assistant Chief A.K. Greenwood

DATE: February 7, 1996

SUBJECT: Internal Affairs Investigation Assigned 1-26-96

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Please find enclosed the results of my investigation on the complaint from Brett's towing and the wrecker dispatch.

The first part of this investigation will be listed as Section #1 and the second part will be marked Section #2. I chose to identify the investigation this way because it was given to me in two parts which I subsequently numbered Section #1 and Section #2.

Section #2 had a table of contents on the front with nine topics included within. Most of these items were assorted statements, copies of various laws and regulations and some other applicable statutes.

The results of my investigation will be reported issue by issue and page by page as they were listed by Mr. Shaw.

Section #1 is a hodge podge of hand written allegations and what appears to be parts of the wrecker dispatch log. The results of my investigation will address each of the applicable issues page by page and I will attempt to identify these complaints by page number that I numbered 1 through 29. The cellular phone logs of Sgt. Malmborg, Officers Lucero, Hancock, McAllister, Ron VanBeekum and Huemiller have also been examined and findings will be reported.

Section #3 will consist of a memorandum dated 5-31-95, another memorandum dated 9-14-95, a copy of Salt Lake County Sheriff's Office wrecker dispatch plan, and a copy of the wrecker dispatch rotation schedule. All Ogden police officers cellular phone records indicated in this report will be on file in my office. Officers request these private records not be turned over to anyone outside of the police department.

The summary will include my conclusion and opinions about this investigation as well as some suggestions on how wrecker dispatch and impounds could be handled in the future.

AKG/loh



0000034

Section #1

CONFIDENTIAL

The following investigation will relate to the packet submitted by Brett's Towing and wrecker dispatch and has been identified as section #1 by me.

Starting with page 1, item 1, there is a short handwritten statement relating to something on West 12th. The paragraph has no date on it and a sketchy description. I have been unable to find anything in our files that matches up with this item.

Item #2 on page 1, dated 1-12-96, 1:27 p.m., 3850 Harrison reports Ogden Auto Body has two trucks on site. Investigation revealed that this relates to Ogden City Police case 96-788 investigated by Officer Shane McGuire. On 2-2-96 at 1030 hours I had Officer McGuire come to my office for an interview about this incident. According to Officer McGuire, one of the persons in this case requested a no preference wrecker, as he recalls, and Ogden Auto Body showed up a short time later. At that time he noticed the other car was leaking anti-freeze and a subsequent check of the vehicle revealed that it couldn't be driven. At that time, the Ogden Auto Body driver made arrangements with the other driver to tow the vehicle. McGuire said he didn't care who towed the vehicle as long as it got removed safely from the scene. It was also noted that McGuire was undergoing FTO training at the time. Officer Lucero was identified as his FTO on this day and according to Lucero, McGuire's explanation of the incident was basically the way he remembers it.

Item #3 on page 1 relates to Ogden Auto Body trying to get a truck from Chris. I'm not sure what this has to do with OPD. Our case number is 96-749 but I'm not sure what this has to do with us. Looks like a complaint against Ogden Auto Body.

Page #2, item #4 was covered in section #2. However, we'll explain it again. OPD case #96-1448. Complaint that Ron had to tow an old junk Citation while Ogden Auto Body got a new Lumina. In reviewing the above listed accident report it is clear that the old Chevy Citation was out in the intersection, thus creating a potential traffic hazard. The Lumina was out of the intersection and was creating no hazard. Sgt. Malmberg exercised good judgement and good police practice by having Ron take the car in the intersection.

Page #3, item #5. No information included as to day of week. Not sufficient information to do any follow-up.

Page #4, item #6. Paragraph says Lisa left and forgot to transfer phones. Not sure what Lisa wants OPD to do about that.

Page #4, item #7. Paragraph alleges an officer called for two no preference wreckers at 21st and Wall and Ogden Auto Body took them both. This issue was also listed in Section #2 but I will address it again. OPD case 95-27053 investigated by Officer Zaccardi. Officer states he called for two no preference wreckers and a short time later Ogden Auto Body showed up. He assumed that they were one of the no preference wreckers he asked for. The driver then made a deal with the other accident victim to tow his vehicle too. Ogden Auto Body driver then allegedly used his cellular phone to call wrecker dispatch and cancel the call. Looks like Ogden Auto Body jumped this call unknown to Officer Zaccardi.

CONFIDENTIAL

Page #5, item #8. Short statement alleging Ogden Auto Body took two cars at 6:49 p.m. on 12-22-95. I presume the allegation is OPD did this without wrecker dispatch. I searched the OPD log on 12-22-95 on and about the time listed and can find no case report for anything at this time.

Page #6, item #9. Short sentence that says OPD dispatch reported a 10-50 on 11-14-95 at 11:23 a.m. A check of OPD log shows an NR case 95-31839. This NR case reports no wreckers needed.

Page #6, item #10. Another short sentence alleging 2 cars towed from 24th and Washington on 11-14-95 between 1:30 p.m. and 3:00 p.m. A search of OPD log reveals no such case.

Page #7, item #11. 20th and Wall, Officer Ron VanBeekum, OPD case 95-21805. I interviewed Officer VanBeekum and he said when he arrived he asked about wreckers and Mr. Fielding said just call those guys over there, pointing to Ogden Auto Body. Sarah Ciulla made a deal with Ogden Auto when they arrived to take her car also. VanBeekum states he didn't insist or suggest that Ogden Auto Body be called. He said they were close and the victims chose them on their own.

Page #8, item #12. A paragraph about the Highway Patrol on a wreck at Riverdale and Wall Avenue. I'm not sure what they want us to do about this case as it is a Utah Highway Patrol case out of the Ogden City limits. Looks like it may be a case of Ogden Auto Body jumping calls.

Page #9, item #13. A short statement that Claire Baur was at 500 West 12th on a wreck. OPD case 95-20246. No vehicles towed. Looks like Ogden Auto Body hustling business.

Page #10, item #14. Short statement says officer called for two no preference and canceled one. On 2-2-96 at 1545 hours I interviewed Officer Ledford regarding this incident and he says he remembers calling two no preference wreckers but that he didn't cancel one of them. He said he was having so much trouble with one driver that he had his hands full and didn't care who took the cars. He said Officer Huemiller showed up to help him and he has no information whether Huemiller canceled one of the wreckers. All Ledford knows is he called for two wreckers and two showed up. I interviewed Officer Huemiller and he says he doesn't cancel calls or dispatch wreckers from his car or anywhere else.

Page #11, item #15. A short statement that a car went into a house in the 500 block of 30th. Incomplete information to locate any kind of a call.

Page #12, item #16. A short statement says officer asked for no preference wreckers and then gave Ogden Auto Body the 10-50 and the other truck the impound. On 2-2-96 at 3:55 p.m. I interviewed officer Watanabe about this incident and he says he doesn't remember switching trucks around if, in fact, he did. Says he has no allegiance to any wrecker companies and treats them all the same.

Page #13, item 17. A short statement about cruising call at 3600 Lincoln. Something about UHP said Ogden Auto Body just stopped. This is not an OPD problem. Not sure what this is other than it appears Ogden Auto Body is jumping calls.

0000036



**CONFIDENTIAL**

Page #14, item #18. 21st and Lincoln, Officer VanBeekum, OPD case 95-6250. Officer VanBeekum states this was a multi-car accident with injuries and he was not the first officer on the scene. He has no recollection now of who called for the wreckers but believes because of the situation that someone may have just called for the closest wrecker to come to the scene. I attempted to call Don Stout and his wife said he has died since the accident. I called Debra Stanger and she asked for no preference.

Page #15, item #19. This accident occurred on 3-19-95 at 25th and Washington Blvd; Officer Jack Alexander handled the case; OPD case 95-5552. On 2-2-96 I interviewed Officer Alexander about this case and he says as far as he remembers he called for a no preference wrecker. He said Ogden Auto Body showed up and he assumed they were dispatched. I attempted to contact Shawn Galloway but no phone listing was available.

Page #16, item #20, 24th & G Avenue, Officer Hancock, OPD case 95-9304. I interviewed Officer Hancock on this case and he said he doesn't remember anyone assisting him on this case. He also states that he was riding a motorcycle this day and certainly didn't come tearing out of Ogden Auto Body going code three. He went on to say this was not an injury accident. He also said that James LaRoy requested Ogden Auto Body wrecker. He doesn't remember the other driver's preference at this time. He believes he asked for a no preference. Said it is possible that when Ogden Auto got there the other driver decided to use Ogden Auto Body. I called James LaRoy and he confirmed he requested Ogden Auto Body. I attempted to call Craig Holmes and was told he had moved to St. George and was not available for follow-up.

Starting on page #17 of Section #1 is what appears to be a log from the wrecker dispatch. There are twelve pages of calls dating back to the first of 1995. I have made phone calls to all the people who had Ogden Auto Body that I could reasonably find and interviewed them concerning their accident as well as their preference for a wrecker. I was surprised that Brett's would be complaining about cases that go back to January of 1995 since we met as a group in May when I was Interim Chief and discussed some of these issues at that time. Subsequent to our May meeting, I put out a letter dated 5-31-95 outlining procedures for officers to follow when calling for wrecker service. Nevertheless, I have gone back as far as I can to get victim input. I consider all information prior to May 1995 as input only.

On page #17 at 5:22 there is a 10-50 that occurred at 864 West 24th Street, OPD case 95-9304, investigated by Officer Hancock. I contacted James LaRoy who stated he requested Ogden Auto Body. I attempted to contact Craig Holmes and he's moved to St. George.

Page #18 - no evidence of Ogden Auto Body being called. Only three items on page with no written allegations.

Page #19 - series of complaints starting with January 15 through March 1; I presume the year to be 1995. No facts or complaints listed on this page. No information on wreckers. No further action taken on this page.

Page #20 - series of calls starting on 3-12-95 through 4-16-95. I went to records and checked each case to see if Ogden Auto Body was listed on any of the cases on this page. I found the following cases:

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1. 3-24-95, 17th and Washington, Cpl. Stuart, OPD case 95-5881. I attempted to call both drivers; #1 a Toby Green who had Ogden Auto Body and could find no listing for him. The other driver, Monika Elmer, did not require a wrecker. Stuart says he always calls for no preference wreckers and doesn't circumvent wrecker dispatch.
2. 4-2-95, 5200 Harrison, Officer Valdez, OPD case 95-6478. I attempted to contact Aldena Jandreau and Cord Hamson. I was unable to contact Aldena and Cord moved and left no forwarding address.
3. 4-3-95, 1400 36th, Sgt. Malmborg, OPD case 95-6543. Attempted to contact Michelle Ward without success. Contacted Brandon Hirschi; stated he had no preference. Police didn't recommend any particular wrecker service.
4. 4-4-95, 100 20th, Sgt. Malmborg, OPD case 95-6612. Interviewed Sgt. Malmborg; said as far as he can remember it was a no preference.
5. 4-8-95, 12th & Wall Avenue, Ron VanBeekum, OPD case 95-6922. James Fridal was unavailable.
6. 4-14-95, 12th & Wall Avenue, Ron VanBeekum, OPD case 95-7321. Interviewed VanBeekum. He said as he recalls this was before the May 1995 meeting and he just called the closest wrecker. Has no specific recollection how wrecker was called. I attempted to call Vicky eddy and was unable to make contact.
7. 4-14-95, 42nd & Harrison, Ron VanBeekum, OPD case 95-7326. Jeradine Johnson and Debra House. Both no preference. **BRETT'S TOWED**
8. 4-16-95, 30th & Washington, Watanabe, OPD case 95-7458. Duane Garcia - no preference. Augustin Esquivel - Peterson Motors - no preference.

Page #21 - calls dated from 5-1-95 to 6-30-95. I searched records for any of these cases that went to Ogden Auto Body and attempted to call victims.

1. 5-8-95, 3200 Harrison Blvd, Officer Brady, OPD case 95-8936. Brady has resigned. Unable to contact him. Contacted Martha Solis who said Ogden Auto Body was a no preference and she was very satisfied with the service.
2. 5-13-95, 5:22 p.m., 867 West 24th, Officer Hancock, OPD case 95-9304. This case is explained previously on page #17.
3. 5-31-95, 29th & Wall, Officer McAllister, OPD case 95-10577. Talked to Cathy Christiansen who said she was familiar with Ogden Auto Body and requested them. The other driver didn't need a wrecker.

Page #22 has dates starting with 7-6-95 through 7-21-95. No specific complaints were written on this page and no accidents that utilized Ogden Auto Body.

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Page #23 is a full page of calls from 7-25-95 to 8-29-95. In searching OPD records, I found the following calls occurred in Ogden City.

1. 7-25-95, 3500 Harrison Blvd, Officer VanBeekum, OPD case 95-15040. I contacted Michelle Parslow who said she asked for a company close to her home. The other vehicle was towed by Cliffs.
2. 8-11-95, 30th & Wall, Officer Cox, OPD case 95-16561. Called Ariana Dempsey who said she requested a no preference and got Brett's. Contacted Jana Anderson said she requested no preference and got Ogden Auto Body.
3. 8-19-95, 25th & Grant, Officer Huemiller, OPD case 95-17268. Contacted Christine Hargis who said she had wrecker referred to her by someone. When asked if it was the officer she said no but couldn't remember who made the referral.

Page #24 has dates beginning with 10-12-95 through 10-16-95.

1. 9-18-95, 30th & Adams, Officer Huemiller, OPD case 95-19665. Officer called for two no preference wreckers and when Steve Valencia arrived on the scene he canceled the no preference and asked for Ogden Auto Body. It turned out that Samuel Chanson didn't need a wrecker and the other no preference was canceled.
2. 10-16-95, 20th & Wall, Officer VanBeekum, OPD case 95-21805. Unable to contact drivers of vehicles. Officer claims Ogden Auto Body showed up on scene and made arrangements to tow both vehicles.

Page #25, another full page of entries dated from 8-26-95 to 10-12-95. In checking OPD records I found the following:

1. 9-18-95, 2669 Harrison Blvd, Officer Ledford, OPD case 95-19675. I tried to contact Delores Rivera, no phone. I tried to contact Dwayne Garcia, no phone. Contacted Officer Ledford. He claims he asked for two no preference wreckers and Lincoln Auto and Ogden Auto Body showed up. Claims he doesn't even know anyone from Ogden Auto Body.

Page #26 is a full page of calls dated 10-12-95 to 11-10-95. No cases in records involving Ogden Auto Body.

Page #27 is a full page of calls dated from 11-10-95 to 12-3-95. A search of OPD records disclosed the following cases handled by Ogden Auto Body.

1. 11-15-95, 12th & Washington, Officer McAllister, OPD case 95-25998. Called Jenna West and she stated she was injured and Ogden Auto was sent as a no preference. Unable to locate Russell Erickson at this time. Left a message on answering machine to call back. No response as of 2-5-96.
2. 11-24-95, 20th & Harrison Blvd, Officer Lucero, OPD case 95-24675. Only one

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wrecker required. Charla M. Underwood requested Ogden Auto Body.

3. 12-3-95, 20th & Lincoln Avenue. This was a fatal accident and the vehicles were taken to Ogden Auto Body at officer's request because they have secure, covered storage for evidence vehicles.

Page #28 - another full page of calls starting with 12-4-95 and ending with 1-1-96. OPD records were researched and the following cases were found to pertain to Ogden Auto Body.

1. 12-27-95, 21st & Wall Avenue, Officer Zaccardi, OPD case 95-27053. In talking to Zaccardi, he called for two no preference wreckers. Ogden Auto allegedly showed up first and Zaccardi thought that was one of his no preference wreckers. Zaccardi claims the driver made a deal with the second victim to tow that car also. Zaccardi claims the Ogden Auto driver said he would cancel the other wrecker through wrecker dispatch.

Page #29 - another partial page of calls starting with 1-2-96 and ending with 1-17-96. Log reports that an Ogden officer called for a wrecker at 1900 West 5600 South in Roy. No record found in OPD records of this case. If the officer was OPD, he was obviously off duty.

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Section #2

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1-29-96 0900 hours

I interviewed Lt. William Ladd in my office concerning a complaint from Brett's Towing alleging that he had canceled their wrecker from picking up an impound at 197 North Pingree on 12-18-95. According to Lt. Ladd he had been receiving telephone complaints from citizens who reported that Brett's Towing was practicing unethical business by charging excessive rates for wrecker service. As Ladd remembers, he had had four complaints against Brett's that same day. Ladd claims that when he heard Brett's dispatched on the call at 197 North Pingree, he called police dispatch and canceled the call and told them to send another wrecker. When asked why he did that, he states that he was just tired of receiving complaints of price gouging by Brett's Towing. I asked Ladd if he knew the state had deregulated prices and that Brett could charge whatever he wanted to charge. Ladd stated that at that time he was not aware of the deregulation and that through subsequent investigation of the alleged price gouging, he found out about the deregulation. Ladd went on to say a few days later someone from Brett's called him and he told them about the complaints. He went on to say that he had also received a letter about what he described as price gouging. The person who called asked if they could have a copy of the letter and Ladd said they could. At that time a fax number was given to Ladd and he attempted to fax a copy of the letter without success. Apparently the number was not a good number. A few days later the person called back and mentioned they hadn't received the letter. At that time, another fax number was obtained from the person and the letter was then faxed to Bretts.

Lt. Ladd says that he is not personally acquainted with any of the wrecker services in Ogden and certainly does not show preferential treatment to any of them. He clearly admits to canceling the call at 197 North Pingree and admits this was done out of frustration. Lt. Ladd said he has been responsive to the situation and has not canceled any other calls for any company. He also states he has never called for or showed any preferential treatment to Ogden Auto Body or any other wrecker service.

1-29-96 1030 hours

Lt. Ladd called me on the phone and stated he had one thing he wanted to add to his comments. I asked what that may be and he stated that a few weeks ago Officer Hancock had been involved in a traffic accident and a no preference wrecker, which turned out to be Brett's, was called and they refused to pick up the police car. Ladd believes the excuse was they were too busy.

1-29-96 1035 hours

I called Officer Hancock to my office for an interview and read him the Garrity Warning. I then asked Hancock if he had ever bypassed the wrecker dispatcher and phoned for Ogden Auto Body or any other wrecker service without going through wrecker dispatch. Hancock stated unequivocally that he has never violated protocol and always uses wrecker dispatch. I then asked Hancock if he had ever received any money, service, discounts or other gratuities from Ogden Auto Body or any other wrecker service and he stated he had not.

I then asked Hancock if he knew of anyone who was calling Ogden Auto or any other company



without going through wrecker dispatch and he said he wasn't aware of anyone who is doing that.

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I inquired as to whether he had ever told anyone that Brett's charged excessive fees for their service. Hancock said he has had complaints from citizens that Brett's charges too much but that he has never told anyone that Brett charges too much. In fact, Hancock says he tells anyone who inquires that they all charge the same.

I also inquired if any supervisor had ever indicated that he should call for Ogden Auto and Hancock said no one had ever said anything to him.

I asked if Hancock remembered Brett's refusing to tow his police car when it was wrecked a few weeks ago and he said he didn't but that Sgt. Phillips told him they declined to tow his car. I asked what he thought about that and he said he didn't care and hadn't given it a second thought. When asked if he had his phone records he stated he has them and will bring them in tomorrow. I asked him if I would find any calls to wrecker companies on his bill and he said I probably would. However, he said I would find they were all after the fact and in conjunction with follow-up on some accidents. Hancock was firm in his statement that he goes by the book, always uses wrecker dispatch and is absolutely guilty of no improprieties what so ever.

1-29-96 1100 hours

I called Sgt. Malmborg to my office for an interview regarding allegations by Brett's Towing and Ogden Wrecker Dispatch and read him the Garrity warning. I then asked Sgt. Malmborg if he was now or if he ever bypassed wrecker dispatch and called wreckers at accident scenes directly by telephone. Sgt. Malmborg stated he does not bypass wrecker dispatch. He did say, per my memo on 9-14-95, that he called Ogden Auto Body to pick up the bicycle at 7th and Washington that had been involved in a fatal accident. Sgt. Malmborg stated that Ogden Auto has a covered, secure area where evidence can be safely stored at a reasonable cost and that he did call for them to take that case. Ordinarily, Malmborg says, he follows protocol to the letter of the law. I then asked Sgt. Malmborg if he received any money, favors or other gratuities from Ogden Auto Body or any other wrecker service. Sgt. Malmborg said that last September, Clair Bower gave him a sweatshirt but that he didn't accept it as, nor did he think of it, as a bribe. According to Malmborg, Claire Bower uses the sweatshirts as advertising and gives them to lots of people around town. Sgt. Malmborg went on to say that he had Ogden Auto put a new engine in his old truck last summer. He said he chose Ogden Auto to do the job because he believes they do good work and he paid \$2,200 for the job. He felt that was a fair price and hardly a gratuity. When asked if he had ever received anything else he mentioned that Ogden Auto Body had donated three cameras to the traffic division a couple of years ago and that Nelson Woodbury from Lincoln Auto had donated one camera. Malmborg said these cameras were donated to Chief Empey and the traffic division and not to any one person in the traffic squad. When asked why these cameras were donated, Sgt. Malmborg said because the wrecker drivers hated to wait for Tech Services to come and photograph serious accidents so they decided to donate the cameras so the photo process could be expedited.

I then questioned Sgt. Malmborg about the letter from Ron's Body Shop dated 1-23-965. Sgt. Malmborg said Travis Van Allen was clearly wrong in his perception as to whether the Chevy Citation was a hazard or not and Sgt. Malmborg produced a case report, 96-1448, from OPD

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records that shows the Citation out in the intersection of 24th and Jefferson creating a hazard. It seems clear to me that the officers used good judgement in having the vehicle removed by the first wrecker on the scene. I would support Sgt. Malmborg in the action he took. It was a safety issue and was handled according to good police practice.

I then questioned Malmborg about paragraph #2 in Mr. VanAllen's letter alluding to the fact that Malmborg cuts Ogden Auto Body's lawn. Sgt. Malmborg denies working for Ogden Auto Body or owing any special favors to them. Malmborg claims that he has two sons, one 16 and one 18, who cut lawns in the summer to earn money for school. In June 1995 the two boys contracted with Ogden Auto to cut their law for \$40.00 every other week. It was not a condition of their employment that Sgt. Malmborg send extra business to Ogden Auto. The boys work only in the summer and certainly are not receiving an extraordinary amount for the work they do. Sgt. Malmborg reiterates that there were no special arrangements for this employment; just two high school boys trying to earn school money.

I then asked Sgt. Malmborg if he had any personal knowledge of any officer bypassing wrecker dispatch and he reported he knew of no one.

I then had Sgt. Malmborg read the statement of Ron Reed dated 1-23-96. According to Malmborg, the statement was fairly accurate but Malmborg took exception to the sentence that said, "He told me that direct calling by police officers had stopped after meeting with towers and A.K. Greenwood." Sgt. Malmborg claims that he told Reed that I had put an order out to go through wrecker dispatch. He states he never knew of any officers calling directly from their cars for specific wreckers so he couldn't say it had stopped. Malmborg says that is an incorrect statement and not what he said.

I then asked Malmborg if there was anything else that he may know about this issue that I should be made aware of. Sgt. Malmborg says there is nothing else and that as far as he knows, no one is bypassing wrecker dispatch. He also claims that neither he nor anyone else ever said not to use Brett's Towing. Malmborg does claim that he has heard many reports of Brett's price gouging but has done nothing to intervene.

1-29-96 1355 hours

I called a Mr. Robert Murdock, 479-7797, in reference to a letter from Ron's Body Shop dated 1-23-96 and interviewed Mr. Murdock. The allegation in the letter is that Mrs. Murdock was forced to allow Ogden Auto Body to tow her vehicle after she was involved in an accident. While interviewing Mr. Murdock, I asked where the accident had occurred since it wasn't mentioned in the letter and he said it was in South Ogden about 1000 east and Highway 89. (Near the Ironwood condominiums). I asked Mr. Murdock if his wife was forced to use Ogden Auto Body and he said she wasn't forced but wasn't given a choice either.

It is clear from the location that this accident did not happen in Ogden City and was not investigated by OPD. I also searched our files for any involvement in this situation and found no record.

Mr. Murdock did say that Ron's had contacted him and said they were going to some council meeting because they weren't getting their share of business.

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1-30-96 0845 hours

I called traffic officer Doug Lucero to my office for an interview regarding allegations that OPD officers are bypassing wrecker dispatch and read him the Garrity warning. I then questioned Lucero about whether he was now or whether he had ever bypassed wrecker dispatch in calling for a wrecker. According to Lucero he has not been calling anyone except the police dispatcher for wreckers. I then asked Lucero if he knew of any other officer who was not following established protocol. Lucero stated he didn't know of anyone who was not following protocol. I then asked if he had ever been told by any OPD supervisor or anyone else to go around Brett's or any other wrecker service and he said he had not. When questioned as to whether he had ever received any money, favor, reduced repairs or other gratuity from any wrecker service, he stated that Sgt. Malmborg had given him a sweatshirt from Ogden Auto Body several months ago but that he felt no obligation to call Ogden Auto over a sweatshirt. He also said Sgt. Malmborg never ever mentioned that he should call Ogden Auto Body because of the sweatshirt.

Lucero mentioned that several months ago his daughter had been in an accident in his new truck and he had Ogden Auto tow his vehicle. He said he chose Ogden Auto because he feels they do good work. He said he didn't get any favors on the tow or the repair as his insurance company paid the bill.

Lucero was then questioned about a letter from D. Woodbury dated 1-24-96 stating Lucero was rude. Lucero then went to records and obtained a copy of OPD report 96-1556. The report indicated that this was indeed a vehicle accident and not just a vehicle that slid off the road and got stuck. According to Lucero, the call came in at 0621 and he didn't get there until 0640. When he arrived, he talked to a Benito Cabrera who stated he had asked for Stauffers Wrecker at around 0620. At 0717 Lucero states he called OPD dispatch and asked where Stauffers wrecker was at. Lucero stated it was snowing, windy and extremely cold and the accident victims were becoming very uncomfortable. When Lucero talked to OPD dispatch, the dispatcher said she didn't know where Stauffer's was and that she would patch him through to wrecker dispatch. Lucero then claims that he asked the wrecker dispatcher "If Stauffers was coming today." Lucero said he felt he was trying to be humorous rather than rude and almost at that second, as the dispatcher was saying Stauffers should be there at any time, the truck came into view and Lucero said the conversation was terminated.

Lucero was then asked if he had any other knowledge about these complaints that I should know about and he remained adamant that he knew of no improprieties being conducted by officers against any wrecker service. Lucero will bring his phone records for analysis as soon as they are available.

1-30-96 1000 hours

I interviewed Officer Ron VanBeekum about the complaints from Brett's Towing and also read the Garrity warning to him.

VanBeekum was asked if he is calling for wreckers from his cell phone and he answered with an emphatic "NO," not now and not ever has he done this. He claims he isn't bypassing wrecker dispatch nor is anyone else that he is aware of. When asked if he had ever been asked by anyone to give preferential treatment to Ogden Auto Body or any other service, he said,



"NO!"

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When questioned about whether he was now or if he had ever received money, service or any other gratuity from anyone, VanBeekum said that Clare Brower had once given him a sweatshirt, Chuck's Towing had given him a baseball hat and Brett's towing had bought his lunch once. I asked if he felt obligated to any of these companies and he replied with an "Absolutely not." VanBeekum went on to say that no person has ever suggested to him that he should funnel business their way nor has there ever been an offer of money, or anything else, to divert business to anyone.

VanBeekum stated about a year ago he had a vehicle repaired at Ogden Auto but that the bid was the same as Tim's Auto and he certainly didn't feel he got a good deal on the repair. He chose Ogden Auto because he felt their work was better.

VanBeekum pointed out that he had called Ogden Auto to store the bike in the fatal accident at 7th and Washington because they were the only agency he knew of who have a secure, safe facility to store evidence vehicles in. He cited my memo as Interim Chief on 9-14-95.

I then questioned VanBeekum about a letter written by Brandon Simonsen dated 12-28-95. The letter insinuated that VanBeekum had called Ogden Auto Body to tow both calls from the 200 block of 17th Street. According to VanBeekum, one of the drivers, a person identified as Delgonie, asked for Ogden Auto Body. VanBeekum said the other car was off the road and he didn't think it needed to be towed. Officer Hancock arrived to assist and upon investigating the other vehicle, Hancock suggested that it needed to be towed also. According to VanBeekum, Tom Baur was there with his wrecker at that time and he asked the lady who owned the other car if she wanted him to tow her car and she said that would be all right. Tom Baur allegedly used his cell phone to call for his other wrecker.

VanBeekum says that quite frequently when only one wrecker is called and it is discovered that another one is needed that the driver on the scene will ask the person if their company can be of service and most people say yes. VanBeekum says he never interferes or suggests that any particular wrecker be called.

VanBeekum provided me with all of his phone records and mentioned I would find no violations on his phone.

#### 1-30-96 1200 hours

I met with Tony Huemiller and advised him of the Garrity warning before questioning him about Brett's Towing complaints.

I asked Huemiller if he had ever circumvented the wrecker dispatch system in the last year. After carefully thinking about the question, Huemiller stated that he did on two occasions. I then asked him how this happened and he stated that on two occasions when accident victims specified Ogden Auto Body he called them directly on his own personal phone to expedite the arrival of the wrecker. Huemiller claims he has never ever called Ogden Auto Body or any other wrecker unless a citizen requests them. He couldn't remember specific cases.

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Huemiller was then asked if he had ever received any money, favors, service or other gratuity from Ogden Auto Body or any other service in the area. Huemiller stated he received a T-shirt from J-Mac Radiator Service and a sweatshirt from Ogden Auto Body. He stated Clair Baur gave him the sweatshirt and that he did not feel indebted to Clair for that shirt.

I then asked Huemiller if he had ever told anybody that Brett's was "price gouging." He said he had never told anyone that.

I asked if anyone had ever told him to boycott Brett's or any other wrecker and he stated no one had. Huemiller was then asked if any service had ever asked him to send business their way and he said, "NO."

I inquired as to whether he had any knowledge of any other Ogden officer who was attempting to circumvent the wrecker dispatch service and his answer was, "NO."

Tony was then questioned about a statement of Brandon Simonsen dated 12-2-7-95. Tony's version of this incident is that he stopped by Ogden Auto to take a break when he was informed by Tom Baur that a suspicious truck had been parked across from the office for quite a while. Huemiller says he stayed about 15-20 minutes and watched the truck that he described as a maroon colored Ford Ranger. He then went out the back way and drove around via 20th Street to try to get a license number on the truck. As he came down 20th, he saw the truck heading west on 20th. He claims he followed the truck westbound on 20th until he got the number. He stated he felt it was one of Brett's spies but doesn't remember the name now. He admits stopping at Brett's when the truck kept going and subsequently came back to Ogden. He claims about 1730 he was sent to back Officer Zaccardi on a traffic accident at 21st and Wall. Huemiller denies calling Ogden Auto Body to the scene. He says the wreckers were either called by Zaccardi or Ogden Auto jumped the call. He has no information on how that happened. I will interview Zaccardi on how Ogden Auto showed up with two wreckers. Tony said as soon as the scene was stabilized he was sent on to control traffic at an injury accident at, he thinks, 12th and Wall.

Huemiller was then questioned about Jared Jepson's letter dated 1-6-96 and Tony says he didn't call any wreckers on this and only assisted Officer Lucero on this case. He did say he was joking with Jared about the video camera because he had heard from other officers that someone was video taping all accidents.

Tony was interviewed about Jared Jensen's statement dated 1-12-96. Tony remembered the incident and believes the content is fairly accurate. His question was, "What's wrong with asking questions?"

The next issue was a letter from Ron's Body Shop dated 1-23-96. Tony readily admitted to riding with Tom Baur on the day in question and states it was clearly with the lieutenant's permission. He stated Tom was not dispatching wreckers or any other offbeat activity while with him. Tony couldn't remember which lieutenant approved the ride-along way back on 8-11-95.

I then asked if Tony had any other information about these allegations that I should know and he said he didn't. He said he is doing nothing wrong and he is tired of Gary Baur making

statements that he is going to get him. He also freely admits that Tom Baur is a close personal friend but, friends are friends and business is business. Tony said he resents the implications that he is on the take as it is totally untrue. He also said he is tired of Brett's henchmen stalking him on and off duty. I advised that while on duty he could be followed but that if he is being stalked in his off duty time, he should seek a complaint against the stalkers. No other information from Tony Huemiller. He will bring in his phone records in as soon as possible and he understands he will not frequent Ogden Auto Body while on duty.

1-31-96 0930 hours

I met with Sgt. Greenhalgh and interviewed him after reading him the Garrity warning. Sgt. Greenhalgh said he has never, ever bypassed wrecker dispatch nor does he know of anyone else who has. I told Sgt. Greenhalgh that there was a rumor going around that he had received a free paint job and some free body work from Ogden Auto Body. Sgt. Greenhalgh said that he had his wife's vehicle painted at Ogden Auto Body several months ago but that he paid \$600.00 for the paint job and has a canceled check to prove it. He also said that a year ago last October his son rolled his pickup truck and he had Ogden Auto Body repair the vehicle. He went onto say that it was an insurance job and he paid the deductible and the insurance paid the rest of the bill. He did mention that Ogden Auto Body gave his son a sweatshirt when he had his wife's vehicle painted. Greenhalgh states that he is friendly with all wrecker companies and discriminates against no one. He also mentioned that no wrecker service has offered any bribe to him nor has anyone ever asked him to send business their way.

Sgt. Greenhalgh returned a few minutes after our interview was over and mentioned that when his son was involved in an accident in the county, he went out to check on his son's welfare and Brett's Towing was on the scene, ready to tow his truck. Greenhalgh states that he didn't want Brett's to tow his vehicle and told the deputy to cancel Brett's as his preference was Ogden Auto Body. Greenhalgh claims he did this because he believes Ogden Auto does better work and offers a more competitive price.

1-31-96 1345 hours

Officer Zaccardi came to my office for an interview on the Brett's Towing complaint and I advised him of the Garrity warning.

I then interviewed Zaccardi specifically about OPD case 95-27053 at 21st and Wall, 1716 hours on 12-27-95. The interview was directed at paragraph #2 of Brandon Simons' statement dated 12-27-95. Allegations are that Ogden Auto Body was called for both vehicles without going through wrecker dispatch. According to Officer Zaccardi, he was dispatched to a two-car accident at 21st and Wall and upon arrival he parked his vehicle to protect the scene and immediately upon determining there were no injuries, called OPD dispatch and requested two no preference wreckers. A few minutes later Officer Huemiller arrived to assist with traffic control. A little while later an Ogden Auto Body wrecker showed up on the scene and he assumed that was one of the no preference wreckers he had asked for. Zaccardi then stated that the wrecker driver talked to both owners and then approached him and said he was going to take both cars. Zaccardi said, "I will have to call dispatch and cancel the other wrecker, and the Ogden Auto driver said don't worry, I'll call wrecker dispatch and cancel the call. He then took out a cellular phone and started dialing a number. Zaccardi said he didn't verify if the guy

made a call or not and still believes he was one of the no preference wreckers he called for.

I then asked what Huemiller was doing during this time and he says he was directing traffic until he was called on another accident at 12th and Wall. I inquired as to whether Huemiller had called Ogden Auto or had asked him if he would, he said "No, he asked our dispatch for two no preference wreckers." I then asked Zaccardi if he had ever made any calls directly to any wrecker service thus bypassing wrecker dispatch and he said he had not. He claims every sergeant he has worked for had been emphatic over the last several months since he started that he must go through OPD dispatch for wreckers.

I also asked if, while in the FTO program, he had ever seen an officer bypass wrecker dispatch and he said he had not. In fact, every one he worked with emphasized the need to follow protocol.

I asked him if anyone had ever offered money or other gratuities to him and he said while he was in FTO training a guy had given him an Ogden Auto Body sweatshirt. He claims he doesn't even know the guy's name and feels no obligation to call him or anyone else.

I then concluded the interview by asking if he had any information about these allegations that I may not have asked about but that I should know. Zaccardi said he isn't aware of anyone doing anything wrong.

It would appear to me that if there is any wrong doing so far it is in wreckers monitoring calls and then jumping the call. Maybe they need to consider a code of ethics for themselves.

1-31-96 1435 hours

I contacted Officer Alexander and informed him of the Garrity warning and questioned him about alleged improprieties with Ogden Auto Body. When asked if he ever circumvents wrecker dispatch by calling wreckers from his cellular phone, Alexander replied, "No." He also says he knows of no one else who does this either. Alexander claims the sergeants have warned repeatedly against anyone doing this type of activity.

I asked if he had ever received any money or other gratuity from Ogden Auto or any other agency and he said, "No." I then asked about the rumor that he got a free paint job from Ogden Auto. Alexander said that was a lie. He said he was talking to Tom Baur about a paint job one day and offered Tom a Browning .22 cal automatic rifle for a paint job. Alexander said the fair market value of the gun is over \$300.00 and Tom agreed to paint his Bronco for that gun. Alexander states that was hardly for free and he claims that no deal was ever made at that time or any other time to send Ogden Auto Body any business. Alexander states that he is personal friends with Tom Baur but that he doesn't let his friendship get in the way of his job.

Alexander ended the interview with the statement that he has no knowledge of any officer sending business to Ogden Auto or any other wrecker service. He said that he personally has only dealt with Stegens and Ogden Auto and that work was certainly not for free.

1-31-96 1500 hours

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I met with Chris McAllister and gave him the Garrity warning before interviewing him about the Brett's Towing complaints.

According to McAllister, he does not now nor has he ever circumvented wrecker dispatch by using his cellular phone to call for Ogden Auto Body or anyone else. In fact, Chris claims he kicked Ogden Auto Body off an accident scene at 22nd and Monroe several months ago because they jumped the call. He says he believes the driver's name was Bob.

McAllister went on to say that he is not personal friends with any of the owners or drivers. I asked Chris if he had ever been offered money, services or other gratuities by Ogden Auto or any other wrecker service. Chris said he has never been approached or asked by anyone to direct business their way. He did tell me that Chuck Hadley gave him a baseball cap and Tom Baur had given him a couple of sweatshirts. He went on to say that after escorting a wide load for Brett he and Sgt. Malmberg and Ron VanBeekum went to the Sundown Cafe on Pennsylvania Avenue with Brett for lunch. After they finished eating, Brett took the ticket and paid for everyone's lunch. Chris said he feels no obligation to any of these people because they gave him a hat or a meal.

When asked if he knew of anyone who was receiving bribes or other favors to send business to Ogden Auto Body, he said he didn't know of any one. He said that he is acquainted with Tom Baur and finds him to be a nice person but that he is not buddies with him. He also pointed out that he is friendly to many other wrecker drivers too.

McAllister claims not to be involved in any illegal or unethical conduct and he is sick and tired of Brett's Towing making allegations and implications that he is. McAllister believes if there is any wrong doing they ought to investigate wrecker dispatch. He claims in the past that wrecker drivers have thanked him for calling their company when in fact he asked for a no preference wrecker. McAllister is afraid that wrecker dispatch is reporting that he is asking for specific wreckers when, in fact, he is not and never has unless it is at the request of a citizen. McAllister says he has no interest whatsoever in who picks up the cars. He said that he, like all other officers he works with, are only interested in prompt, efficient service and that is all.

2-1-96 1245 hours

I talked with Officer Huemiller again and discussed two reports off the wrecker dispatch log, 95-17268 and 95-19665. Tony said Ogden Auto Body was requested by the respective drivers and he did not suggest anyone to them. He said he specifically remembers Steve Valencia asking for Ogden Auto Body. Once again, Huemiller denies directing business to Ogden Auto Body

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### Summary

In checking over two hundred cases on the wrecker dispatch log, I have been unable to uncover any obvious, widespread plot on the part of Ogden City police officers to circumvent the wrecker dispatch service. All officers interviewed answered questions to the best of their memory and recollection.

It also appears to me that there have been a couple of cases where an Ogden Auto Body wrecker was either just passing by or was intentionally jumping calls. This does not appear to be widespread but there have been a few cases where that may have happened. According to some of the officers interviewed, Brett's towing has just showed up a couple of times over the past year without being dispatched either. There is absolutely no evidence that would prove that any wrecker service is intentionally jumping calls and each could effectively argue that they just happened to be passing by. From an officer's point of view, it really doesn't matter who shows up as long as they get the wreck out of the intersection as soon as possible. In fact, prior to my May meeting with the wrecker owners, it appears that officers used to ask our dispatch to call for the nearest wrecker on particularly serious cases that were causing a traffic hazard. Evidence would indicate that stopped in June of 1995.

It also appears that Brett's has a question about Ogden Auto Towing both cars from the scene of the accident. It would appear that Ogden Auto does employ some super sales techniques and does talk people into letting them tow both wrecks. Once again, offices don't care if people want Ogden Auto to tow their cars. It also appears Bretts has employed the same tactic on occasion.

This whole case would lead one to believe that there is a bit of over zealous competition between Brett's and Ogden Auto Body. I detected that feeling when I met with them in May of 1995 and I feel that to some extent this complaint is a result of that competition.

I feel certain that as a result of this investigation, with occasional inspection, that Ogden offices will all follow protocol at all times. I didn't find any evidence in interviewing accident victims or in the cellular phone records of our officers where anyone is willfully or wantonly circumventing wrecker dispatch. There is absolutely no evidence of a widespread conspiracy through out the traffic division or the department.

I think it would be very presumptuous and maybe even slanderous that anyone would allude to a conspiracy at the OPD to favor Ogden Auto Body. I'm sure that a better, more efficient and cost-effective method could be employed to dispatch wreckers.

Many years ago, Ogden Police Dispatch took care of the dispatching of wreckers but because of the lack of manpower and no computer, the system didn't work very well and was subsequently relegated to the Woodbury family who established wrecker dispatch. Now that OPD dispatch is fully staffed and with the aid of computers, I believe our dispatchers could provide this valuable service at a much lower fee to wrecker companies and with much improved efficiency. Salt Lake City and Salt Lake County dispatch centers both dispatch wreckers. The county does it without cost and the city charges \$100.00 per wrecker per year with each business license they sell. Either plan is workable and from a police point of view is much more manageable through the computer generated reports that would be available. It would also take

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all of the guess work out of whose up for the next call as the computer would automatically rotate the list and recommend the appropriate wrecker for the next call. I have attached Salt Lake County's plan to this report for consideration.

If there are any questions in this investigation, it would be why do most officers favor Ogden Auto Body. It doesn't appear that there is any money or other thing of value being traded but it seemed apparent to me that some officers favor Ogden Auto simply because they provide fast, friendly and more efficient service. It seems to me that all companies should work hard to do the best job they can and do it with a smile while offering a fair price..

I have carefully explained procedure for calling wreckers to Sgt. Malmberg and the traffic squad since they were singled out by Mr. Shaw and they say they are doing nothing wrong. I also pointed out to each of them that they are, under no circumstance, at liberty to recommend wreckers, lawyers or any other service while in the employ of Ogden City. That admonishment included quoting prices for wrecker service. It also occurred to me that Ogden City should also consider going back to the procedure we use to employ of allowing all wrecker companies to bid for our impound service on a yearly or biyearly basis. It just doesn't make sense to me, since prices have been deregulated, that we are allowing different fees to be charged for our impounds. It seems logical that one company should bid for this lucrative business and bid a fair price for all who may become involved in an Ogden City impound.

It is now my recommendation that this case be closed and that all OPD officers be reminded of proper procedure to follow when requesting wrecker service in the future.

If there are any questions regarding this rather confusing investigation, please feel free to call me at 629-8552.

AKG/loh

**STUBBS' INTERVIEW OF HUEMILLER  
MARCH 8, 2000 (R. 1499-1520)**





**CONFIDENTIAL**

INTERVIEW TAKEN BY LT. JOHN STUBBS WITH SGT. TONY HUEMILLER, BOTH OF THE OGDEN CITY POLICE DEPARTMENT ON 3/8/00.

STUBBS: Today is March 8, 2000. It is about ten minutes after 2:00 P.M. This is Lt. Stubbs. With me is Sgt. Tony Huemiller. Okay Tony, we discussed pretty much what the interview is going to entail. What I'm going to do now is read you your Garrity Warning directly from the sheet and if you understand it and don't have any questions about it, I will ask you to sign and date the sheet indicating you do understand it. Okay? Sgt. Tony Huemiller, I advise you that you are required to testify or provide evidence as part of an official investigation of the Ogden City Police Department. This inquiry involves investigation into unauthorized use of towing companies out of rotation for possible gain and is in accordance with departmental policies and procedures. This is not a criminal investigation. You must answer questions related to your knowledge of facts surrounding this incident. The information or evidence you provide for this administrative investigation cannot be used against you in any criminal proceeding, however, your statements may be used against you in a subsequent administrative action. Refusal to answer questions truthfully or to testify to matters related to this incident implies that you have violated departmental policies and such refusal is cause for disciplinary action including termination from the department. Any question about the Garrity Warning? Then, if you would, sign on the signature line and date it please.

Okay, now since we have to start somewhere, I guess we'll just start with, have you been doing this?

HUEMILLER: Doing?

STUBBS: Sending unauthorized tows down to Ogden Auto Body without going through wrecker dispatch?

HUEMILLER: No.

STUBBS: You have not?

HUEMILLER: I haven't done any tows for quite a while.

STUBBS: So, let me ask you this, how many cell phones do you have?

HUEMILLER: I have a police department one, I have a...my wife has one, and I have a third phone.

STUBBS: Who owns the third phone?

HUEMILLER: I don't, well, I got it through Ogden Auto Body.

STUBBS: Who pays the bill?



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HUEMILLER: I do. There hasn't been a bill. I just got it. It's under my name.

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TONY HUEMILLER INTERVIEW

STUBBS: You got it at about the time you walked out of the Strike Force. Took it new in the box in there. Broke it out and said, where do you send the bill? That about right?

HUEMILLER: I don't know that I understand that question.

STUBBS: I didn't think it was that difficult to understand Tony.

HUEMILLER: When I came out...

STUBBS: Yes, Tom...

HUEMILLER: Okay wait. When I came out, Acker started having a tizzy because my wife's phone, which is our phone, was on the Strike Force bill. Kay? Acker told me that in order for me to switch it over that I had to get a credit report done to get it changed to my address. We are, we've been in the process of trying to sell our house and get a new house. Our, there's a number that mortgage company uses to determine whether you can qualify for a loan or not. Okay, and we're like one number below being able to qualify for the house that we want. A credit app is a ding on your credit. Okay? So I went to Tom and asked him to give me a phone so that I could use it, but I would pay the bill. He got the phone in my name. My name is on the box that it came in that you say I broke it out of and began using it. Which I haven't used very much because I haven't needed to.

STUBBS: Whose name is the bill in?

HUEMILLER: I don't know.

STUBBS: Who's paying that bill?

HUEMILLER: I'm going to pay that bill.

STUBBS: Who is paying it?

HUEMILLER: There hasn't been a bill.

STUBBS: There hasn't been a bill, well, so you haven't seen a bill.

HUEMILLER: I haven't seen a bill and I was told there was not a bill.

STUBBS: Who told you there wasn't a bill?

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HUEMILLER: Tom told me there wasn't a bill.

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STUBBS: So...

HUEMILLER: Because I've asked. Cause you figure after one month there'd be a bill.

STUBBS: I would figure that.

HUEMILLER: Right.

STUBBS: So would you.

HUEMILLER: That's why I asked.

STUBBS: Where do you figure the bill is?

HUEMILLER: He's probably, if there has been one that's come, he's probably got it. He's told me that there's not a bill yet. But I plan on paying that myself. That was planned from the beginning. That's why my name was on the phone.

STUBBS: What would that cell number be? The phone number?

HUEMILLER: I think it's 725-0447.

STUBBS: You think?

HUEMILLER: I barely used it. I believe it's 725-0447.

STUBBS: Who carries the contract on that phone? What company?

HUEMILLER: Voice Stream I believe.

STUBBS: But you have not called Ogden Auto Body, ever, using a cell phone to bring a tow truck to an accident scene or DUI scene.

HUEMILLER: Ever?

STUBBS: Or an impound?

HUEMILLER: That phone?

STUBBS: Any phone.

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HUEMILLER: Yes, I've called them before. I've had to call them.

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TONY HUEMILLER INTERVIEW

STUBBS: Okay, my initial question was how long have you been doing this...

HUEMILLER: No, your question was have I ever done it unauthorized. Okay, all of the drug seizures, our policy was to call direct.

STUBBS: Okay, exclude drug seizures.

HUEMILLER: I cannot...

STUBBS: Now we're talking about when you were in Uniform, before you went to Strike Force and since you have been out of Strike Force, have you used a cell phone or any other means to circumvent wrecker dispatch and get Ogden Auto Body to a scene for a tow?

HUEMILLER: You're asking like three questions.

STUBBS: Nope.

HUEMILLER: Since I've, yes you are. Since I've been back...

STUBBS: Any...

HUEMILLER: No. In the Strike Force, no. Um, prior to that I was a sergeant in Uniform, not that I recall. I don't think I ever did. When I was in Community Policing before that, I don't think I ever did. Now we're back like four or five years. Okay? Prior to that, prior to being told that I was not to circumvent wrecker dispatch, for any reason...

STUBBS: When were you told that? And who told you?

HUEMILLER: Five years ago. Um, I don't know that I was told personally, but when one of these investigations occurred in the past we were then directed not to circumvent wrecker dispatch in any way. Um, after that time I don't recall ever calling him or a tow that he wasn't already coming on. I never circumvented dispatch after that with any phone. That's why I said it's kind of, you're asking three different times in one question.

STUBBS: Where did you work for the year 1995?

HUEMILLER: Community Policing or Uniform. I'm not sure what time, what the date was I went into Community Policing.

STUBBS: During the year 1995 you went down to Ogden Auto Body frequently, didn't you?

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HUEMILLER: I've gone there every year frequently.

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TONY HUEMILLER INTERVIEW

STUBBS: During the year 1995 you were calling Ogden Auto Body directly to scenes for tows without going through wrecker dispatch, weren't you?

HUEMILLER: I don't know if it was 95.

STUBBS: Okay, if it wasn't 95, when might it have been?

HUEMILLER: Before that.

STUBBS: Before that?

HUEMILLER: Before I was told not to circumvent wrecker dispatch.

STUBBS: And do you remember who, and again, do you remember who it was that told you that? Whoever did that first investigation?

HUEMILLER: I don't, I don't...

STUBBS: Would that be A.K. Greenwood?

HUEMILLER: It could have been. I don't know that A.K. specifically told me, but the word filtered out, I don't know that I was directly told.

STUBBS: So before that issue got clarified, which I'm guessing we are both in agreement, would be the A.K. investigation, I'm not aware of one before that, are you?

HUEMILLER: I think there was one before that. Um...

STUBBS: A.K. Greenwood's investigation was where he actually called in officers and talked with them?

HUEMILLER: I think, I not 100%, its been awhile.

STUBBS: So prior to that you were doing it. After that, you did not?

HUEMILLER: Yes.

STUBBS: Well, that leaves us a little problem, because you were given Garrity under A.K.'s investigation. Do you know how you answered that question under Garrity to A.K. Greenwood?

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HUEMILLER: I don't remember.

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TONY HUEMILLER INTERVIEW

STUBBS: Do you want me to refresh your memory? I asked Huemiller if he had ever circumvented the wrecker dispatch system in the last year. After carefully thinking about the question, he stated that he did on two occasions. I asked him how this happened. He explained that. Huemiller claims he has never, ever called Ogden Auto Body or any other wrecker unless a citizen requests them.

HUEMILLER: Right.

STUBBS: That isn't how you just answered the question here.

HUEMILLER: You didn't ask me if someone, I said that I didn't circumvent, or that I circumvented wrecker dispatch. When people wanted them, I'd call them.

STUBBS: No, you answered the question with you called them directly to the scene, circumventing wrecker dispatch before you were told not to. A.K. Greenwood asked you that same question and you told him no. You told me yes.

HUEMILLER: Now you're talking semantics.

STUBBS: No I'm not.

HUEMILLER: Yes you are. Because circumventing wrecker dispatch is one issue and calling without a request for preference is another.

STUBBS: On February 11<sup>th</sup> of this year you stopped Jamie Jason for D.U.I., 2900 block of Madison. Officer Hunt pulled up out of courtesy to see if he could take the call, take the case. I have the case right here.

HUEMILLER: Can I look at it?

STUBBS: In a minute.

HUEMILLER: Okay.

STUBBS: Um, it turned out to be probably a drug D.U.I., under the influence of drugs, not alcohol, which he was not certified in D.R.E. so he called, suggested to you to get B.J. Mills up there who is certified in D.R.E. to handle the case.

HUEMILLER: Okay, I know where you're talking about.

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STUBBS: Okay. Officer Mills then did the D.U.I, the D.R.E. Officer Hunt handled the impound. You handled the wrecker. Officer Hunt says that he put Ogden Auto Body on the impound

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because that's who showed up, but he did not call them. B.J. Mill says you called them on a cell phone, brought them right there. Says, hey Tom, come on up to 2900 Madison and get this car, it's a D.U.I.

HUEMILLER: No, I said it's a drug seizure.

STUBBS: No, it wasn't a drug seizure.

HUEMILLER: To my knowledge it was a drug seizure.

STUBBS: No, no, there was no evidence in the car. There were no drugs in the car. There were no paraphernalia in the car and that paperwork was plainly marked. There was no evidence whatsoever in the car and the vehicle was impounded for Improper Registration, No Insurance, Unsafe or Invalid Safety Inspection and D.U.I. and that is all it was impounded for and the paperwork clearly indicates that's all it was impounded for. How many times...

HUEMILLER: My understanding was that was a drug seizure, there was paraphernalia, that's why I did what I did. My understanding from there, there was paraphernalia there. A snitch came out of the, while we were there, and said that the driver had two eightballs of crank in his pocket. The only reason I called at that time was because my understanding was that it was a drug seizure. That's what I was told by the two officers. That they had paraphernalia. The (inaudible).

STUBBS: So the officers would tell you that there's paraphernalia, but the reports would indicate there was no paraphernalia. In fact, the space for evidence isn't left blank, it's marked none.

HUEMILLER: I can't explain why they did it, but it was understanding there was drug paraphernalia on the, I can't remember if it was the girl or the guy had a crank pipe that was paraphernalia in there. That's why I called them.

STUBBS: Ever had a conversation with Keith Brady about directing tows to Ogden Auto Body?

HUEMILLER: Not for a long time.

STUBBS: This would have been maybe five years ago. About sending cars to Ogden Auto Body because Brett's and wrecker dispatch was screwing Ogden Auto Body.

HUEMILLER: I'm sure we talked about it, but I don't recollect any specific conversation.

STUBBS: I guess what you're telling me is you never followed up on the agreement that you all

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made that you would do that?

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TONY HUEMILLER INTERVIEW

HUEMILLER: I never made an agreement with anybody.

STUBBS: And you and VanBeekum never discussed how you were sending vehicles down there?

HUEMILLER: You're talking when...

STUBBS: Ron VanBeekum. Over the last several years. Anytime between 1995 and now. Anytime. So we get that cleared up, Tony.

HUEMILLER: You don't have to yell at me.

STUBBS: Then don't play games with me on the interview.

HUEMILLER: I'm not playing games, kay.

STUBBS: I'm asking you.

HUEMILLER: I have not been sending cars to Ogden Auto Body other than drug seizures since probably 95, in that time.

STUBBS: And you have never approached an officer and indicated to him how much you'd appreciate it whatever he could do to send vehicles straight to Ogden Auto Body.

HUEMILLER: Why would I say that?

STUBBS: Why would you say that? Well, you would say that because you've been doing it, others were doing it.

HUEMILLER: I haven't.

STUBBS: You asked me a question. And you wanted others to do it. That's why you would ask someone to do that.

HUEMILLER: I haven't. I'd like nothing more than to see a friend of mine succeed. I've tried to, I've tried to get the wrecker dispatch situation straightened out. I've approached the supervisor at our dispatch center to try to initiate a contract whereby the city could run it and have it run correctly. Yes, I could have had discussions with multiple officers about the work that Ogden Auto Body does being better, the service they give on impounds and tows being quicker, I don't think I've influenced anybody to do tows other than what they do on their own anyway. And probably our conversations went more along the lines of who gives the best service.

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STUBBS: So when multiple officers have told me within the last couple of days that they have

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overheard your conversations on the cell phone at auto accidents, calling Ogden Auto up to the scene on the cell phone, have witnessed you do it several times, they're all mistaken. This is what you're telling me.

HUEMILLER: We're talking right now?

STUBBS: We're talking...

HUEMILLER: No.

STUBBS: We're talking, yeah, over the last several months.

HUEMILLER: Yeah, I have done it in the past. I already said...

STUBBS: We're not talking 1995.

HUEMILLER: Drug seizures.

STUBBS: We're not talking drug seizures.

HUEMILLER: I don't recollect ever calling Ogden Auto Body on the phone for a tow that wasn't already going through dispatch.

STUBBS: So all of these other officers you're saying are either lying or they're grossly mistaken?

HUEMILLER: They could be mistaken as to what they heard.

STUBBS: Over and over again?

HUEMILLER: I can't speak for what they said.

STUBBS: Okay. Did you ever have any conversations with Kelly Zaugg about sending vehicles down there?

HUEMILLER: Probably, I don't remember.

STUBBS: You don't remember?

HUEMILLER: I've talked to Kelly millions of times.

STUBBS: How close friends are you with Tom Bauer?

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TONY HUEMILLER INTERVIEW

HUEMILLER: Were neighbors. Were close friends. He's probably my best friend outside of the department, maybe even including the department.

STUBBS: For how long? Five years, ten years?

HUEMILLER: Fifteen.

STUBBS: Fifteen years?

HUEMILLER: Yes.

STUBBS: Do you get a lot of benefits from your friendship with Tom?

HUEMILLER: What do you mean by that?

STUBBS: Jazz games?

HUEMILLER: No. Not that I can remember. I've got season tickets of my own.

STUBBS: Races in California?

HUEMILLER: I didn't get that from Tom.

STUBBS: Where did you get that from?

HUEMILLER: PPG sent me.

STUBBS: Why would PPG send you?

HUEMILLER: Me and Tom have been talking for a long time, a long time, about what I'm going to do after this job. His dad's not going to be at Ogden Auto Body forever. He needs, or he's going to need a partner. We talked during that time about going to sponsored training to learn more about body work, fitting, painting, every aspect of it. PPG was willing to send me to a paint school, an estimating school, so that over a period of time I could bring up my level of expertise in the area of body work so that I could leave here and go work at Tom's. PPG is the one that paid for the trip to, to the Laguna Race.

STUBBS: You been to any of their schools?

HUEMILLER: Huh?

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STUBBS: Have you been to any of their schools?

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TONY HUEMILLER INTERVIEW

HUEMILLER: No, because...I haven't.

STUBBS: Any other trips like that? Baseball games in Colorado?

HUEMILLER: No. No baseball games. No trips to Paris. Um, no.

STUBBS: You haven't been to any Colorado Rockies games?

HUEMILLER: No.

STUBBS: Cheap repair work?

HUEMILLER: Haven't had a job done.

STUBBS: You guys are trading cars back and forth all the time, Tony.

HUEMILLER: Yeah.

STUBBS: What's going on here?

HUEMILLER: Just like anywhere else. I buy them from anybody. You know, I know officers that buy cars from Intermountain. I know officers that buy cars from Lincoln Auto.

STUBBS: So far they've been able to show us receipts for the purchases.

HUEMILLER: I can show you the cars that I've bought.

STUBBS: Can you show us the receipts for the purchases?

HUEMILLER: No. Well, I don't know exactly what you mean. I got loans on cars.

STUBBS: Okay, you buy your car, you pay the bill, you get a receipt.

HUEMILLER: I got a loan. I had loans.

STUBBS: For how many different cars?

HUEMILLER: I had loans on two. One I bought out right. That one I didn't buy.

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STUBBS: What would you do with these cars?

HUEMILLER: Well, I bought them, I bought an Explorer. That's the one you're thinking of.

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Um, I bought it, I had it fixed, I drove it for about a year, I got a loan on it, I had it for about a year and sold it, bought another one.

STUBBS: Who did you sell it to?

HUEMILLER: I don't remember. Some lady. I'm sure I could find it.

STUBBS: Was it ever registered to you?

HUEMILLER: Yes.

STUBBS: So we should be able to find that through DMV, the Explorer that was registered to you.

HUEMILLER: Well, it was registered to me or to my wife.

STUBBS: We should be able to find that Explorer through DMV registered to either you or your wife.

HUEMILLER: I believe so.

STUBBS: Any others?

HUEMILLER: I had a Tracker for a while.

STUBBS: Tell me about that one.

HUEMILLER: That was a wrecked car. I bought it. Had it fixed. Drove it. Sold it. Same basic thing.

STUBBS: You don't know who you sold that one to?

HUEMILLER: I could probably find out. I don't remember right now.

STUBBS: Did you register that vehicle?

HUEMILLER: I don't know if I registered that one.

STUBBS: If you didn't register it, whose plates would have been on it?

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HUEMILLER: I don't remember. Uh, I don't know. I might have driven it for a time with the dealer plate on it.

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TONY HUEMILLER INTERVIEW

STUBBS: From Ogden Auto Body?

HUEMILLER: Ogden Auto Body. I don't remember.

STUBBS: Well, did you ever have it insured when you were driving it? That's another traceable thing we can find if you don't any receipts.

HUEMILLER: I think so. I don't know. I'd have to look.

STUBBS: You don't know?

HUEMILLER: I don't know.

STUBBS: Does that mean there's a possibility of your driving without insurance on it?

HUEMILLER: I don't remember. It was probably insured. I don't, I don't remember.

STUBBS: And the Explorer.

HUEMILLER: I can find it out. I can find it out, I'm sure. I'm sure that we're insured. I don't remember.

STUBBS: How many vehicles do you have now?

HUEMILLER: One. Two counting the police car.

STUBBS: And your wife?

HUEMILLER: That's the one we have.

STUBBS: Who's it registered to just out of curiosity?

HUEMILLER: Me and her or her, I don't, I don't know.

STUBBS: What kind of car is it?

HUEMILLER: It's an Expedition.

STUBBS: Does it have insurance?

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HUEMILLER: Of course.

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TONY HUEMILLER INTERVIEW

STUBBS: How many other cars?

HUEMILLER: I don't own any other cars.

STUBBS: No, I mean...

HUEMILLER: Oh, I'm, I've sold nine people, up to ten and sold cars that I never took possession of.

STUBBS: How do you manage that?

HUEMILLER: Well, John Stubbs says if you ever hear of a certain car that's for sale, let me know. I say okay, Tom's got a car. Talk to him about buying it. I've done that a bunch. It wouldn't be restricted to there. Sherm's Store said I got a car and John Stubbs said I'm looking for one just like that if you see one and I see it. Same thing.

STUBBS: What's in it for you?

HUEMILLER: Finder's fee. I mean, my brother bought a car from uh, Poorman out at, from Poorman out at Nissan, Peterson Nissan. The next time I buy a car I get a finder's fee. Or he sends me a dinner in the mail. It's the same thing.

STUBBS: You're not sure how many cars you've done this with from Ogden Auto Body, taken and then...

HUEMILLER: No, the ones that I've driven I've told you about.

STUBBS: How about a 1995 Honda Accord EX? Did you use that one?

HUEMILLER: I don't remember that, a car like that.

STUBBS: Well, we've got you and your wife driving it so try to remember.

HUEMILLER: 1995 Honda?

STUBBS: 1995 Honda Accord EX.

HUEMILLER: You're going to have to refresh my memory more than that.

STUBBS: You've gone through so many cars you don't remember if you had a Honda Accord

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EX for a little while? Have you...

HUEMILLER: Can I see what you are referring to?

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TONY HUEMILLER INTERVIEW

STUBBS: It's a seizure and we have you in it, with a dealer plate. Could be?

HUEMILLER: I don't remember. I don't recall anything like that.

STUBBS: Okay, now when I hear "I don't recall" I guess what that means is that it's possible because you're not denying that you may have been driving that car.

HUEMILLER: without more more information....

STUBBS: Then let me ask you this, have you driven any seized vehicles when you weren't supposed to be, Tony? Have you using any seized vehicles temporarily?

HUEMILLER: We have used seized vehicles.

STUBBS: Who is "we?"

HUEMILLER: On deals and stuff. Strike Force.

STUBBS: No, I'm not talking about using seized vehicles for deals.

HUEMILLER: I don't recall this what you're talking about. I'd have to, you'd have to tell me more because I don't know what you're talking about.

STUBBS: You know whether or not you've used seizure vehicles temporarily.

HUEMILLER: I have not, to my recollection, I have never driven a seized vehicle for my personal use.

STUBBS: But that means you could have. It just means you don't remember it. Correct?

HUEMILLER: Can we go off for a minute?

STUBBS: Certainly. For clarification with the Honda Accord, when I asked you if you have used any seized vehicles through the Strike Force for personal use and you tell me you can't remember, that tells me that it's possible that you did.

HUEMILLER: I don't think I have. No.

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STUBBS: Okay. Do you recall a search warrant that you did where you called out McGregor and Ramsey for property, uh, Jason Davis, the Davis brothers. Remember that?

HUEMILLER: Uh huh.

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TONY HUEMILLER INTERVIEW

STUBBS: You did, you guys did a couple search warrants that night. This one was at 2145 Quincy and through the course of busting up the lab and whatnot, there was a bunch of property in the house and several vehicles out in the driveway. This ring a bell yet?

HUEMILLER: Uh huh.

STUBBS: Okay. Specifically, with regard to that case, do you remember seizing, do you remember how many vehicles you seized?

HUEMILLER: Four or five.

STUBBS: Do you by any chance remember what they were?

HUEMILLER: Couple of pickups, Camaro.

STUBBS: Do you remember if there was a Jeep there, a Wrangler or Cherokee? One of the two.

HUEMILLER: I can't.

STUBBS: Do you remember getting into a discussion, we'll call it a discussion, with McGregor over four tires and rims and an air compressor, where they should go?

HUEMILLER: I don't remember talking to him about an air compressor or tires.

STUBBS: Okay, let me get more specific. You called Ogden Auto Body for the seizure, which is proper, and apparently they didn't have room here, not here but at the facility they were at, at the time for I guess these were the great big truck tires, the off road tires and rims, and I guess it was a 25 gallon air compressor which is pretty good sized. You don't remember discussing with Officer MacGregor where they should go? He wanted them to go one place and you said, they're here so we're shipping it down to Ogden Auto.

HUEMILLER: I don't remember that discussion. I do remember, now that you said, them going to Ogden Auto Body, but I don't remember the discussion.

STUBBS: Okay. Do you know where those tires and rims and compressor are today?

HUEMILLER: I don't have a clue.

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STUBBS: You have no idea?

HUEMILLER: I don't.

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TONY HUEMILLER INTERVIEW

STUBBS: After they went to Ogden Auto Body, do you have any idea what happened to them?

HUEMILLER: I, I think, I don't have a clue on the air compressor, but the tires and rims stayed there for quite a while. I remember Tom saying something to the effect that somebody was coming to get the tires and he was going to charge them for storage or something and that's the last I heard of them, I don't have a clue. I think I had a discussion at some point in time in the past about the tires, rims and air compressor with Hardhead over at the County Attorney's Office as to what should be done, did we file on them, what got done with them, where we stood on seizing them or forfeiting them or anything like that and I don't remember what the outcome was. Uh, I have no idea where they're at.

STUBBS: Okay, for the record I'm going to read through some questions and I'm just going to let you answer them. Okay? Have you ever been approached by any representative of any towing company with respect to sending tows their way?

HUEMILLER: Yes.

STUBBS: Explain.

HUEMILLER: Over the years that I've been here, Ogden Auto Body wants tows. In the past we've talked with Chris about tows. Everybody wants tows. I don't know who all I've talked to over the years.

STUBBS: Okay. Have you ever been approached by any Ogden officer with respect to sending tows to a particular towing company other than the normal rotation?

HUEMILLER: Ever? Yes.

STUBBS: Explain.

HUEMILLER: We talked about it a lot. I was privy to conversations where Brady talked with people about sending tows to certain places. Officers have asked me, who would you send them to. Ogden Auto Body is who I recommend.

STUBBS: But you've never been approached to actually send wreckers, or send tows there? To actually do this? By another officer?

HUEMILLER: I'm sure I have over the years. I can't remember a specific conversation right now

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though. (Inaudible) Lots of people have asked me where to send tows.

STUBBS: Did you ever request a particular towing company without going through wrecker dispatch, absent seizures?

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TOY HUEMILLER INTERVIEW

HUEMILLER: My entire career, yes.

STUBBS: Well, let's keep it since 1995 until now.

HUEMILLER: Not that I can remember. Ask that one again, so I have it straight.

STUBBS: Request a particular towing company without going through wrecker dispatch, absent, for seizures.

HUEMILLER: Well, if you're gonna request, it shouldn't be on the radio and requests I've done are few and far between as a sergeant. I can't remember a specific circumstance where I've, where I've called direct like you accused me of earlier.

STUBBS: Other than seizures, do you use a cell phone to call for a tow? Directly to the towing company, Ogden Auto Body?

HUEMILLER: No. I don't think I have.

STUBBS: Have you ever asked the driver at an accident or D.U.I. if they have a preference, they tell you no preference, you call Ogden Auto Body and mark owner request on the accident report?

HUEMILLER: Ever?

STUBBS: Uh huh.

HUEMILLER: Yeah.

STUBBS: When?

HUEMILLER: Used to get done all the time way back when. Way back, we're talking a lot of years, but not that I can recall for a long time. I haven't done an accident report for...

STUBBS: How about between 1995...

HUEMILLER: I haven't done an accident report for five years.

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STUBBS: So between 1995 and now you wouldn't have done this?

HUEMILLER: I don't recall doing it, having done an accident report.

STUBBS: Is that something you would do?

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TONY HUEMILLER INTERVIEW

HUEMILLER: An accident report?

STUBBS: No. Would you do that on an accident report?

HUEMILLER: Prior to 95? Where they specifically said no preference?

STUBBS: Uh huh.

HUEMILLER: Not that I can recall.

STUBBS: Okay, and my question now, is that something you would do?

HUEMILLER: Now? No.

STUBBS: Between 1995 and now, is that something you would normally do?

HUEMILLER: No.

STUBBS: What knowledge do you have about any Ogden police officers of any rank, past or present, that may have had unauthorized or seemingly questionable dealings with any of the towing companies?

HUEMILLER: What knowledge do I have that anybody did, regardless of rank, of questionable dealings with Ogden Auto Body?

STUBBS: Whether they work here now or used to work here.

HUEMILLER: I guess what I was going to ask you, what do you mean by questionable?

STUBBS: Seems questionable to you.

HUEMILLER: I can, I can probably list 50 people that have had questionable dealings.

STUBBS: Okay, what we're looking for here is who's out of policy?

HUEMILLER: To my knowledge there is no policy on requesting tows. So out of policy is a

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broad thing. You know, I don't know where you want to go.

STUBBS: To your knowledge there is no policy on requesting tows.

HUEMILLER: Is there a policy on requesting tows? In the policy manual?

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TONY HUEMILLER INTERVIEW

STUBBS: Doesn't have to be in the policy manual. But they're in writing.

HUEMILLER: You're asking about questionable...

STUBBS: Let me ask you this...

HUEMILLER: ...things with other officers.

STUBBS: Is it against departmental procedures to circumvent wrecker dispatch? Yes or no.

HUEMILLER: I think there was something that came out that said we would not circumvent wrecker dispatch.

STUBBS: Well, you actually went through an internal affairs investigation on that very topic, didn't you?

HUEMILLER: I believe so.

STUBBS: Uh huh. So you are really aware that that is against departmental policies and procedures regardless where it may be written, correct?

HUEMILLER: It's not supposed to be done.

STUBBS: Correct. So, now that we've established that, who's doing it? To your knowledge?

HUEMILLER: To my knowledge, I have no personal knowledge. It would be what I would call hearsay

(End of Tape 1/Side 1)

STUBBS: ... anyone else that's actually done this.

HUEMILLER: At best what I know is second hand knowledge about anybody else. Um, I, I'm pretty sure Zaugg has been calling direct. Pretty sure that Ron VanBeekum's been calling direct. I think at one point in time, most the Traffic officers were doing it, calling direct.

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STUBBS: Did you ever see anybody do it?

HUEMILLER: I don't think I've ever personally seen someone call direct.

STUBBS: Overheard the conversation?

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TONY HUEMILLER INTERVIEW

HUEMILLER: Not that I can recall. Did I have a good idea that it was going on? At times. Yeah. But I don't remember hearing a conversation. I don't remember...

STUBBS: What would give you the idea?

HUEMILLER: Because I would hear later that they did.

STUBBS: From somebody else? Not from that person?

HUEMILLER: Right. But the only direct knowledge that I can think of John as far as you know, what I did see or hear, was say that you had two cars at an accident, both needed to be towed, two or more, you know it doesn't really matter, Ogden Auto Body's coming on one and rather than, maybe the second one's a no preference, and rather than calling for a second no preference, they hook two at once. And I have seen that directly. But I cannot...

STUBBS: You claimed to A.K. Greenwood at that time that you had never called Ogden Auto Body or any other wrecker unless the citizen requests them. Is that completely truthful?

HUEMILLER: On accidents, oh, was that truthful?

STUBBS: Uh huh. Keeping in mind this was January of 1996 that you made that statement.

HUEMILLER: Say it again.

STUBBS: You claimed to A.K. Greenwood that you had never, ever called Ogden Auto Body or any other wrecker unless a citizen requests them.

HUEMILLER: I don't know that I said never, ever, but um, I recall uh

STUBBS: Wasn't it...

HUEMILLER: In fact, during that time, you have to understand during that time; Okay, John, do you have a preference on a tow truck? Well who would you call? Kay? And if you talked them into Ogden Auto and they then requested it or they asked for your opinion and then they requested it, you know, yes, that was done quite a bit. Offering our opinion as to who they should call and then they say, Ogden Auto. Did I never, ever on a crash? I don't remember.

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STUBBS: That wasn't the question.

HUEMILLER: I don't recall saying never, ever. I've called Ogden Auto Body. I don't recall ever calling prior to that time without a request. But like I said, it was easy to talk people into requesting.

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TONY HUEMILLER INTERVIEW

STUBBS: Is there anything you want to add to this?

HUEMILLER: Other than there is probably 40 - 50 people that have taken favors for Tom in exchange for things and I can dig.

STUBBS: Taking favors in exchange for things?

HUEMILLER: Probably for tows.

STUBBS: Okay. Oh, I do have to give you an order. You are not allowed, you are ordered to not discuss this case with anyone short of your attorney obviously, if you get one.

HUEMILLER: I'm going to discuss it with my wife.

STUBBS: Okay. You know what I'm talking about.

HUEMILLER: Right.

STUBBS: Do not discuss this case, especially with any other member of the department unless it's a member, or unless it's an investigator assigned to the case or obviously if the chief has any questions. And that is to be considered an order. Okay?

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**INTERNAL AFFAIRS INVESTIGATION**  
**APRIL 21, 2000 (R. 337-40)**



## INTERNAL AFFAIRS INVESTIGATION

# Memo

**To:** Assistant Chief Marlin Balls

**From:** Lieutenant Steven R. Watt

**CC:**

**Date:** 04/21/00

**Re:** Internal Affairs Investigation, relationship between Sgt. Tony Huemiller and Ogden Auto Body;  
Findings and Recommendations

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During the course of this investigation into the listed allegations, several other violations of policy and State of Utah law were identified. The initial allegations will be dealt with first, followed by violations of policy and law as identified through the investigative process.

### ALLEGATIONS:

1. Officers of the Ogden Police Department, specifically identified by the complainant, Jeff Wangsgard of Ron's Auto Body as Sgt. Tony Huemiller, Officer Ron VanBeekum and Officer Kelly Zaugg were improperly sending tow business to Tom and Clare Baur of Ogden Auto Body, in violation of the tow agreement between the Wrecker Association and Ogden City.
2. The above named officers are receiving "kickbacks" of \$75.00 to \$175.00 per tow that they send to Ogden Auto Body.
3. The above named officers have a "special relationship" with Ogden Auto Body in which the Baur's provide gifts in return for the tow business sent to them.
4. That the listed officers are "on the take", to the detriment of free enterprise, namely the towing and auto body repair industry in Ogden City, and to the Ogden Police Department.

### FINDINGS AS TO SGT. HUEMILLER:

1. Allegation 1, **SUSTAINED**, investigation reveals evidence of the sending of unauthorized tows to Ogden Auto Body, by Sgt. Huemiller, in circumvention of directed Departmental policies and procedures.

References as follows; Part 2, Sec. A., pg. 4; Part 2, Sec. B., pg. 2, pg. 3, pg. 5, pg. 10, pg. 11; Part 2, Sec. E., pg's. 1-11; Part 3, Sec. B., pg. 16-17; Part 4, Sec. B., pg. 3, pg. 29.

2. Allegation 2, **UNFOUNDED**; no evidence of cash payments to Sgt. Huemiller has been located.
3. Allegation 3, **SUSTAINED**, there is substantial evidence of "gifts", to include free cell phones, deals on vehicles and vehicle repairs, use of vehicles with dealer plates and other favors provided to Sgt. Huemiller, by Ogden Auto Body and Tom Baur, as a result of the practice of sending unauthorized tows to Ogden Auto Body.

References as follows; Part 2, Sec. A., pg. 4; Part 2, Sec. B., pg. 10-13; Part 2, Sec. D., pg's. 1-13; Part 2, Sec. F., pg. 2, pg. 4; Part 4, Sec. B., pg. 38; Part 5, Sec. B., pg. 1, pg. 10, pg. 14.

4. Allegation 4, **SUSTAINED**, the "special relationship" between Sgt. Huemiller and Ogden Auto Body is clearly viewed by outsiders as graft and the relationship has lead to substantial economic gain for Ogden Auto Body, as well as substantial economic loss for the other shops in the industry.

#### **VIOLATIONS OF POLICY BY SERGEANT TONY HUEMILLER:**

1. Policy 1, II, A., violations of the Law Enforcement Code of Ethics, Law Enforcement Code of Conduct, Ogden Police Department Values.

##### **SUSTAINED**

Substantial evidence exists of Sgt. Huemiller clearly violating the Code of Conduct, including lying, using the authority of the office for personal gain, and engaging in potentially illegal behavior.

References: see Part 2, Sec's. D, E, F; Part 5, Sec's. A, B, C

2. Policy 1, III, B, 3..."represent the department at all times and are subject to the same laws, ordinances and statutes as the citizens they protect".

##### **SUSTAINED**

Substantial evidence exists that Sgt. Huemiller has poorly represented the department and that he has violated laws, ordinances and statutes, to wit, 41-1a-1101 (Driving Seized Vehicles), 41-1a-1303 (Driving Improperly Registered Vehicle), 41-3-501 (Driving on Dealer Plates), 76-8-105 (Receiving Bribe by a Public Servant), 10-3-1304 (Use of Office for Personal Benefit), 76-8-508 (Tampering with a Witness) and 76-9-210 (Telephone harassment).

References: see Part 2, Sec's. D, E, F; Part 5, Sec's. A, B, C

3. Policy 1, III, E., ... officers must conduct themselves in a manner which does not bring discredit to them, the department, or the City.

##### **SUSTAINED**

When the full report hits the press, as it will do, the Ogden Police Department's reputation will be substantially tarnished.

4. Policy 1, III., G., 2, 4., Incompetence, ...bring discredit... fail to obey and follow the rules and regulations and personnel policies of the Ogden City Police Department....

**SUSTAINED**

Substantial evidence exists that Sgt. Huemiller has clearly violated this policy.

References: see Part 2, Sec's. D, E, F; Part 5, Sec's. A, B, C

5. Policy 1, III., R., 3, Gratuities.

**SUSTAINED**

Substantial evidence exists that Sgt. Huemiller received special gifts, gratuities and special benefits, in the form of car deals, use of vehicles, cell phones, etc., that were a direct result of the violation of the policy on tows.

6. Policy 1, III., C., Compliance with Orders; to wit, Memorandum dated May 31, 1995, entitled "Wrecker Requests", to all officers, from Chief A.K. Greenwood, clearly specifying how wreckers were to be called to the scenes of accidents; training of officers by FTO's in the handling of tows, and clear departmental history and understanding of the handling of tows. Weber Morgan Narcotics Strike Force Policy, as stated by Lt. Tarwater, not to operate seized vehicles for drug deals or for personal use.

**SUSTAINED**

Substantial evidence exists that Sgt. Huemiller knew that his actions and activities in regards to tows were clear outside departmental policies and procedures and that he did them anyway. Sgt. Huemiller admitted to knowing about the memo and proper procedures and admitted to violating the memo and the stated procedures after receiving the memo. Sgt. Huemiller admitted to driving seized vehicles during drug cases.

References: see Part 2, Sec's. D, E, F; Part 5, Sec's. A, B, C

7. Policy 12, V., E., Lying during questioning in an administrative investigation. *Note: does not require that the employee lie under Garrity, only that the employee lie.*

**SUSTAINED**

Clear evidence of lying under the previous investigations (Garrity) and the current investigation exists.

References: see Part 2, Sec's. D, E, F; Part 5, Sec's. A, B, C

8. Ogden City Personnel Policies and Procedures Manual, Sec. IX, F., 2, several bullets.

**SUSTAINED**

9. Ogden City Personnel Policies and Procedures Manual, Sec. I, I., Conflicts of Interest, relating to acceptance of gifts if the gifts... "tends to influence the employee in the discharge of his/her duties."

**SUSTAINED**

References: see Part 2, Sec's. D, E, F; Part 5, Sec's. A, B, C

10. Ogden City Personnel Policies and Procedures Manual, Sec. J., Acceptance of Gifts; pecuniary value of more than \$50.00.

***SUSTAINED***

Clear evidence of gifts, to wit, trips, car deals and cell phone bills, exist as a result of the special relationship regarding tows.

References: see Part 2, Sec's. D, E, F; Part 5, Sec's. A, B, C

For more detailed information of the allegations, facts and findings, see the investigative notebook.

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**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER  
NOVEMBER 21, 2001 (R. 1557-64)**

**CIVIL SERVICE COMMISSION  
OGDEN CITY, WEBER COUNTY  
STATE OF UTAH**

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<b>GRIEVANCE AND APPEAL OF</b>	)	<b>FINDINGS OF FACT,</b>
	)	
	)	<b>CONCLUSIONS OF</b>
	)	
<b>SERGEANT ANTHONY HUEMILLER</b>	)	<b>LAW, AND ORDER</b>
	)	

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A hearing before the Ogden City Civil Service Commission was held on August 13, 14, and 15, 2001, with all three commissioners present. The appellant, Sergeant Anthony Huemiller (hereinafter "Tony Huemiller"), was also present along with his attorneys, Erik Strindberg and Lauren A. Scholnick, of the law firm of Cohn, Rappaport & Segal, P.C. Ogden City was represented by Stanley J. Preston and Judith D. Wolforts of the law firm of Snow, Christensen & Martineau, who were also present. Based on the testimony and evidence presented at the hearing, the Commission, being fully advised in the premises, now enters the following Findings of Fact, Conclusions of Law, and Order:

**FINDINGS OF FACT**

1. Tony Huemiller was hired by Ogden City to be a police officer on December 5, 1983. On January 13, 1996, he was transferred from the Uniform Division to the Community Policing Unit. On August 17, 1996, he was promoted to the rank of Sergeant and transferred back to the Uniform Division. On April 5, 1997, Sergeant Huemiller was transferred from the Uniform Division to the Weber-Morgan Narcotics Strike Force, and on January 8, 2000, he was transferred from the Strike Force back to the Uniform Division.
2. On February 24, 2000, a public complaint from Jeff Wangsgard of Ron's Auto Body was received by the Ogden Police Department alleging that Tony Huemiller was improperly sending tow business to Ogden Auto Body.
3. After an internal investigation, conducted by Lieutenant Steven R. Watt and reported on April 21, 2000, and which revealed apparent misrepresentations of the truth, insubordination by continuing a practice clearly against the desires of top police administration, conflict of interest, violation of Ogden City Police Department policies, and conduct unbecoming on Ogden City Police Officer, a predetermination hearing was conducted by Ogden City Police Chief Jon J. Greiner on May 11, 2001. In addition to Chief Greiner and Sergeant Huemiller, the following individuals were in attendance: Attorney Erik Strindberg representing Sergeant Huemiller, Ogden Police Association Representative John Valdez, Assistant Ogden City Police Chief Marlin Balls, Assistant Ogden City Attorney Andy Blackburn, and Ogden City Personnel Director Jim Bristow.

4. In a letter to Sergeant Huemiller dated May 15, 2000, Chief Greiner stated that he found the allegations of wrongdoing sustained and that Sergeant Huemiller's employment with Ogden City was terminated effective May 20, 2000.

5. On May 19, 2000, Sergeant Huemiller filed a Grievance and Appeal with the Ogden City Civil Service Commission. In the Grievance and Appeal, Sergeant Huemiller denied all of the charges.

6. The Ogden City Civil Service Commission found that Sergeant Huemiller had misrepresented the truth.

a. In the predetermination hearing with Sergeant Huemiller conducted by Chief Greiner on May 11, 2000, Chief Greiner stated, "Although we have a Garrity piece contained within this policy, we also have a piece that says, 'Members being questioned in an administrative investigation are to answer truthfully. Refusal to answer or answer [sic] falsely is cause for disciplinary action, including termination from the department.'"

b. Ogden City Police Policy No. 1 states, "It is the policy of the Ogden Police Department that the Law Enforcement Code of Ethics and the Law Enforcement Code of Conduct are the general standards of conduct for officers of the Ogden Police Department. The Ogden Police Vision, Mission, Values, and Leadership Principles are also adopted as the philosophy of this department. All employees are expected to adhere to these statements."

(1) In its "Vision Statement," the Ogden City Police Department says, "The other values to which the Ogden Police Department is committed are:

- Protecting Constitutional Rights
- Problem Solving
- Teamwork
- Long-Range Planning
- Integrity (emphasis added)
- Courtesy and Compassion

(2) The Law Enforcement Code of Conduct in a section titled "Integrity" states, "The public demands that the integrity of police officers be above reproach. Police officers must, therefore, avoid any conduct that might compromise integrity and thus undercut the public confidence in a law enforcement agency" (*emphasis added*).

(3) The Law Enforcement Code of Ethics requires an officer to be: "Honest in thought and deed both in my personal and official life. I will be exemplary in obeying the law and the regulations of my department" (*emphasis added*).

In Webster's Third New International Dictionary, "integrity" is defined as "utter sincerity, honesty, and candor . . ." and honesty is defined as "adherence to the facts: freedom from subterfuge or duplicity . . ."

c. Sergeant Huemiller violated these codes and this policy by lying during the investigation that led up to his termination. He was either not truthful in an Internal Affairs Investigation concerning adherence to Ogden City's towing procedures conducted by Assistant Chief A. K. Greenwood in January

1996, or he was not truthful in his interview on this same subject conducted by Lieutenant J. M. Stubbs on March 8, 2000. Both of these interviews were conducted after Sergeant Huemiller had been given the warnings required by the U.S. Supreme Court in *Garrity v. New Jersey*, 1967 (385 U.S. 479). "This is not a criminal investigation. You must answer questions related to your knowledge of the facts surrounding this incident. The information or evidence you provide for this administrative investigation cannot be used against you in any criminal proceedings. However, your statements may be used against you in a subsequent administrative action. Refusal to answer questions or to testify to matters related to this incident implies that you have violated departmental policies and such refusal is cause for disciplinary action, including termination from the department."

When discussing his internal affairs investigation into a complaint from Brett's Towing and the wrecker dispatch, Assistant Chief A. K. Greenwood stated that he met with Tony Huemiller on January 30, 1996, and questioned him about the complaint. "I asked Huemiller if he had ever circumvented the wrecker dispatch system in the last year. After carefully thinking about the question, Huemiller stated he did on two occasions. I then asked him how this happened and he stated that on two occasions when accident victims specified Ogden Auto Body he called them directly on his own personal phone to expedite the arrival of the wrecker. Huemiller claimed he has never ever called Ogden Auto Body or any other wrecker unless a citizen requests them" (*emphasis added*).

Despite this denial, he answered similar questions completely opposite when interviewed by Lieutenant J. M. Stubbs on March 8, 2000, as part of Stubbs' investigation into towing procedure violations. Lieutenant Stubbs stated that Sergeant Huemiller "denied circumventing wrecker dispatch by a cell phone or any other means. He indicated that before he went to Strike Force, and was a Uniform Sgt., he didn't as far as he could recall, but he did not think that he ever had. He added that, after being told not to circumvent wrecker dispatch for any reason, about five years ago (Greenwood investigation) he never did it with any phone . . . . Tony subsequently refutes his initial denials by indicating he had been circumventing wrecker dispatch; he just couldn't remember if it was in 1995 but said it was before he got told not to (that would be January of 1996). He admits doing this prior to the Greenwood investigation but not after" (*emphasis added*).

Sergeant Huemiller also misrepresented the truth in his account of his participation in the seizure of an automobile at 29th and Madison at night. He admitted that he called Ogden Auto Body directly on a cell phone provided to him by Ogden Auto Body because the automobile was a drug seizure case and all autos seized for drugs were to go to Ogden Auto Body. However, there were no drugs in the auto and there was no paraphernalia in the car. Officer Mills, who was assisting in the investigation, did find a pipe on the driver with a small amount of marijuana residue in it, but he and the driver were some distance away from Sergeant Huemiller, so he could not have been aware of the residue in the pipe. Yet as Officer Mills approached Sergeant Huemiller, Huemiller was already on his cell phone. Officer Mills overheard Sergeant Huemiller say, "Tom, come get the car, it's a DUI." In Lieutenant Stubbs' interview with Sergeant Huemiller, Stubbs states, "No, no, there was no evidence in the car. There were no drugs in the car, there were no paraphernalia in the car, and that paperwork was plainly marked. There was no evidence whatsoever in the car and the vehicle was impounded for Improper Registration, No Insurance, Unsafe or Invalid Safety Inspection, and DUI, and that is all it was impounded for and the paperwork clearly indicates that's all it was impounded for."

Sergeant Huemiller was not a credible witness during the August 13-15, 2001, hearing. He frequently questioned the meaning of common words, argued with the attorney asking the questions, had



long pauses before answering simple questions, and parsed sentences, the effect of which was to make a simple question complicated.

7. The Ogden City Civil Service Commission found that Sergeant Huemiller was insubordinate by continuing a practice clearly against the desires of top police administration.

The Ogden City Police Department and its top administration have long had a clear and consistent policy or procedure for calling wreckers to tow cars when needed.

a. General Order Number 61, dated February 28, 1968, and addressed to All Police Officers from Chief L. A. Jacobsen, states in pertinent part: "A roster will be maintained in Central Service, and the dispatcher will call each wrecker service in turn, when needed."

b. In a Supplement to General Order Number 61, dated December 16, 1969, and addressed to All Police Personnel, Chief L. A. Jacobsen reiterated the Ogden City Police Department Policy on calling for wrecker service. He stated, "The staff has received complaints that there is a possibility certain wrecker services are receiving more calls than others. I would, at this time, like to remind each officer that it is up to the owner of the vehicle involved to state his preference, within reason, as to which wrecker he wants . . . .

"If the owner does not have any preference, it is definitely NOT left to the discretion of the police officer as to which wrecker service to call. The officer will notify the dispatcher and state NO PREFERENCE on the part of the owner of the vehicle. The dispatcher will then call the next wrecker according to the list maintained in the Communications Office . . . .

"In no case shall any member of the department show preference in requesting any wrecker service" (*emphasis in original*).

c. This proper procedure for requesting a wrecker when needed was re-emphasized in a memorandum from Chief A. K. Greenwood, dated May 31, 1995, to All Uniform Officers, Parking Technicians, and entitled, "Wrecker Requests." Chief Greenwood stated, "Under no circumstances will an officer request a specific wrecker service. When the owner requests a specific wrecker, that owner's name will be given to the dispatch center at the time of the request. Wreckers that arrive at an accident scene on their own will not be allowed to tow the vehicles.

"Officers will not call wreckers directly by phone or any other means to avoid going through the dispatch center and the wrecker dispatch. All impounds and accident tows will be made through our dispatch center and proper documentation made.

"Should an emergency arrive [sic] that an exception needs to be made, only the sergeant on duty or the Duty Lieutenant may waive the normal rotation and a specific request to be made. This also must go through the dispatch center and documentation made" (*emphasis in original*).

d. Again on May 7, 1999, Assistant Chief Marlin Balls sent a note to Traffic Sergeant Spence Phillips, the subject of which was "Towing." Chief Balls said, "At the present time I am investigating why Ogden Auto Body has so many more calls for towing than all the rest of the wreckers in Ogden. As I mentioned, the matter is under investigation and I hope I don't find anyone who is preferring OAB or influencing anyone to choose them. See that all officers know that we do not prefer one wrecker over another" (*emphasis in original*).

e. Despite these widely circulated and well-known general orders, memorandum, and notes from top police officials, Sergeant Huemiller admitted to Lieutenant Stubbs that he had preferred Ogden Auto Body and told him how he did it. In his March 8, 2001, interview, Sergeant Huemiller stated that he had, in fact, been circumventing wrecker dispatch, but he couldn't remember if it was before or after the Greenwood investigation in January of 1996.

He said that it was easy to talk a driver who had no preference for a particular wrecker to request Ogden Auto Body. In his interview with Lieutenant Stubbs, Sergeant Huemiller stated that if he asked a driver if they had a preference for a tow truck and the driver asked you who you would call, "And if you talked them into Ogden Auto and they then requested it or they asked for your opinion and then they requested it, you know, yes, that was done quite a bit. Offering our opinion as to who they should call and then they say Ogden Auto. Did I never, ever on a crash? I don't remember. . . . I don't recall saying never, ever. I've called Ogden Auto Body. I don't recall ever calling prior to that time without a request. But like I said, it was easy to talk people into requesting."

8. The Ogden City Civil Service Commission found that Sergeant Huemiller had a conflict of interest.

a. Sergeant Huemiller's professional interest and loyalty in following the policies and procedures of the Ogden City Police Department were in conflict with his personal interest in obtaining favors from Ogden Auto Body and his loyalty to his friend, Tom Bauer, one of the owners of Ogden Auto Body.

He freely admitted that he and Tom Bauer were neighbors and close personal friends, stating that Tom Bauer is probably his best friend outside of the department and maybe his best friend even including the department and they had been friends for fifteen years. He also acknowledged that he and Tom Bauer had talked about him (Tony Huemiller) going to work at Ogden Auto Body after he retired from the Police Department.

b. When Sergeant Huemiller's friendship with one of the owners of Ogden Auto Body is juxtapositioned alongside his behavior in at least three different areas, the conflict of interest between his personal and professional lives becomes apparent.

(1) As noted above, Sergeant Huemiller admitted violating the policy and procedure of the Ogden City Police Department by circumventing wrecker dispatch and sending tow business to Ogden Auto Body.

(2) Sergeant Huemiller also acknowledged that he had a cell phone that had been provided to him by Ogden Auto Body. This phone was in addition to one provided to him by the Ogden Police Department and one that his wife had. When asked on March 8, 2000, who was paying the bill for the cell phone provided by Ogden Auto Body, he replied, "I haven't seen a bill and I was told there was not a bill." When asked who told him there was not a bill, he said, "Tom told me there wasn't a bill." All calls by Sergeant Huemiller to Ogden Auto Body were made on this phone—none on his Ogden City Police Department cell phone. Although he did eventually pay the bill for the phone, it was only after the investigation into the complaint by Jeff Wangsgard of Ron's Auto Body that Sergeant Huemiller was improperly sending tow business to Ogden Auto Body had begun.

(3) Sergeant Huemiller acknowledged buying a wrecked Geo Tracker from Ogden Auto Body, having it fixed, driving it for a period of time, and then selling it. He could not remember if he had registered it or not. He also stated that if he hadn't registered it, then he drove it with dealer plates from Ogden Auto Body.

9. The Ogden City Civil Service Commission found that Sergeant Huemiller violated Ogden City Police Department policies.

a. As was noted above, the policy of the Ogden City Police Department was that police officers not show preference to any towing company when calling for a tow, and that all calls for wreckers go through the dispatch system. This policy was set forth in General Order Number 61, February 28, 1968; Supplement to General Order Number 61, dated December 16, 1969; Memorandum dated May 31, 1995; and a Note dated May 7, 1999. All of these written policy and procedure statements were widely circulated and set forth above.

Despite these clear statements of policy, which were widely disseminated, Sergeant Huemiller admitted to Lieutenant Stubbs that he had violated the policy by calling Ogden Auto Body directly on a cell phone, thus preferring Ogden Auto Body over other wrecker companies and by not going through the wrecker dispatch system. These facts are more fully set forth in Section 7e, above.

10. The Ogden City Civil Service Commission found that Sergeant Huemiller had engaged in conduct unbecoming a police officer.

At the conclusion of Lieutenant Stubbs' interview with Sergeant Huemiller, Stubbs admonished Huemiller not to discuss the case with anyone. Stubbs said, "Do not discuss this case, especially with any other member of the department unless it's a member, or unless it's an investigator assigned to the case or obviously if the chief has any questions. And that is to be considered an order, okay." Nevertheless, Sergeant Huemiller later that same day telephoned fellow Ogden Police Department Officer Scott McGregor and discussed the case with him. Sergeant Huemiller accused Officer McGregor of being a rat and a snitch and giving him up.

Thus, by disobeying a direct order from a superior officer, Sergeant Huemiller engaged in conduct unbecoming an Ogden City police officer.

### **CONCLUSIONS OF LAW**

1. The Ogden City Police Department has a well-articulated policy demanding honesty and integrity from all police officers. Sergeant Huemiller violated this policy by misrepresenting the truth concerning his circumvention of the wrecker dispatch procedure.

2. The Ogden City Police Department and its top administration have had a long-term, clear and consistent policy or procedure for calling wreckers to tow autos when needed. Sergeant Huemiller violated this policy and in so doing he was insubordinate by continuing a practice clearly against the desires of top police administration.

3. Sergeant Huemiller's personal interest in being loyal to his friend Tom Bauer, an owner of Ogden Auto Body, by diverting towing business to that company and by accepting favors from him was in conflict with his professional interest and duty to follow Ogden Police Department policies and procedures.

4. By showing a preference for sending tows to Ogden Auto Body, Sergeant Huemiller violated Ogden City Police Department policies prohibiting showing any wrecker company a preference and by circumventing wrecker dispatch.

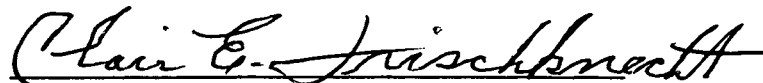
5. Sergeant Huemiller's action in disobeying a superior officer's direct order not to discuss the towing case with any other member of the police department was conduct unbecoming an Ogden City Police officer.

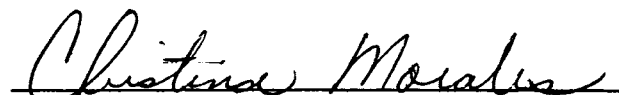
### ORDER

It is hereby ordered, based on the foregoing Findings of Fact and Conclusions of Law, that Chief Greiner's termination of Sergeant Anthony Huemiller's employment with Ogden City is affirmed.

DATED: November 20, 2001.

#### CIVIL SERVICE COMMISSIONERS

  
Chairman Clair Frischknecht

  
Commissioner Christina Morales

  
Commissioner Marj Reynolds

### CERTIFICATE OF MAILING

I hereby certify that on the 21<sup>st</sup> day of November, 2001 I mailed a true and correct copy, postage pre-paid, of the foregoing Findings of Fact, Conclusions of Law, and Order to:

Stanley J. Preston, Esquire  
Snow, Christensen & Martineau  
Attorney for Ogden City  
No. 10 Exchange Place, Eleventh Floor  
P.O. Box 45000  
Salt Lake City, UT 84145

Erik Strindberg, Esquire  
Cohn, Rappaport & Segal  
Attorney for Appellant Huemiller  
P.O. Box 11008  
Salt Lake City, UT 84147-008

Appellant Anthony Huemiller  
1354 East 5150 South  
South Ogden, UT 84403

Lee Ann Peterson